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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1983

ALEXANDER L. STEVAS  
CLERK

Alean Hester Faust, Administratrix of  
the Estate of Charles Lonnie Faust,  
Deceased; Tommy Bennett and Curtis  
Muldrow, Petitioners,

v.

South Carolina State Highway Department,  
and the United States of America,  
Respondents.

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I

Did the United States owe petitioners a duty in Admiralty and may the United States be held liable for personal injuries and wrongful death suffered by pleasure-boaters within the Intracoastal Waterway as a result of the failure of the Coast Guard and Corps of Engineers to responsibly mark, sign, or in the alternative remove a known hazard to navigation which the United States had actively undertaken to regulate, control and remedy?

## II

Did the State of South Carolina subject itself to the plenary Federal power over Admiralty and Commerce and waive its Eleventh Amendment immunity and become liable in Admiralty for the personal injuries and wrongful death negligently inflicted upon the petitioners when the State, by voluntary legislative enactment actively undertook ownership and operation of the South Island Cable Ferry across the Atlantic Intracoastal Waterway?

## TABLE OF CONTENTS

	<u>Page</u>
Questions Presented.....	1
Table of Authorities.....	vi
Opinions Below.....	xiv
Jurisdiction.....	xiv
Constitution, Treaties , Sta- tutes and Regulations.....	xv
Statement of the Case.....	1
Reasons for Granting the Writ..	

### INTRODUCTION:

This Court is the final  
arbiter over the circuits'  
confusion and conflict as  
to the proper application  
of the Suits in Admiralty  
Act and the Eleventh  
Amendment in Admiralty... 27

- (a) Decisional conflict  
within the Fourth  
Circuit..... 27
- (b) Decisional conflict  
between other Courts of  
Appeal..... 27
- (c) Departure from prin-  
ciples of maritime  
law..... 28
- (d) Decisional conflict  
with controlling  
Supreme Court pre-  
cedent..... 28

(e) Important unsettled federal questions decided.....	29
 I. THE UNITED STATES COAST GUARD AND CORPS OF ENGINEERS OWED PETITIONERS A DUTY IN ADMIRALTY AND THEY BECAME LIABLE FOR THEIR FAILURE TO RESPONSIBLY MARK, SIGN, OR IN THE ATERNATIVE REMOVE THE KNOWN HAZARD TO NAVIGATION WHICH THEY HAD ACTIVELY UNDERTAKEN TO REGULATE AND CONTROL.....	32
A. <u>The (SIAA) and the Non-applicability of the Discretionary Function Exemption.....</u>	33
B. <u>The Indian Towing Argument.....</u>	37
C. <u>The Statutory Liabilities of the United States Government.....</u>	41
D. <u>General Tort Liability</u>	46
 II. THE STATE OF SOUTH CAROLINA WAIVED ITS ELEVENTH AMENDMENT IMMUNITY AND IS LIABLE IN ADMIRALTY FOR THE DAMAGES AND INJURIES SUFFERED BY THE PETITIONERS.....	49
A. <u>Introduction.....</u>	49
B. <u>Waiver Pursuant to Parden.....</u>	50

	<u>Page</u>
C. <u>Waiver Under Moragne</u> ...	56
D. <u>Applicability of the Rivers and Harbors Act</u> ..	60
Conclusion.....	64

#### APPENDIX:

Appendix A.....	A-1
Appendix B.....	B-1
Appendix C.....	C
Appendix D.....	D-1
Appendix E.....	E-1

# TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Afran Transp. Co. v. U.S., 435 F.2d 213 (2nd Cir. 1970)....	44
American Export Lines, Inc. v. Alvez, 446 U.S. 274, 100 S. Ct. 1673, 64 L.Ed.2d 284 (1980).....	29, 30
Atlantic Refining Co. v. Moller, Moller, 320 U.S. 462, 64 S.Ct. 225, 88 L.E. 168, reh. den. 321 U.S. 801, 64 S.Ct. 516, 88 L.E. 1088. (1943).....	62
Boston Edison Co. v. Great Lake Dredge and Dock Co., 423 F.2d 891 (1st Cir. 1970).....	35
California v. Sierra Club, et. al., 451 U.S. 287, 101 S.Ct. 1775, 1782, 68 L.Ed. 2d 101 (1981).....	61
Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968)..	50, 52, 61
Cort v. Ash, 422 U.S. 66 , 95 S. Ct. 2880, 45 L.E.2d 26 (1975).....	62
Dalldorf v. Higgerson-Buchanan, Inc., 402 F.2d 419 (4th Cir. 1968).....	37
DeBardleben Marine Corp. v. Uni-	

<u>Cases:</u>	<u>Page</u>
ted States, 451 F.2d 140 (5th Cir. 1971).....	27, 34, 44
Doyle v. United States, 441 F. Supp 701 (D.C.S.C. 1977)...	9,14,20, 34,48,49
Eastern Transportation Co. v. United States, 272 U.S. 675, 47 S.Ct. 289, 71 L. Ed. 472 (1927).....	46
Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) <u>reh. den.</u> 416 U.S. 1000.....	51
Employees v. Missouri Public Health Department, 411 U.S. 279, 93 S.Ct. 1614, 36 L. Ed. 2d 251 (1973).....	51
Florida Dept. of State v. Trea- sure Salvors, 102 S.Ct. 3304 (1982).....	50
Gaspar v. United States, 460 F. Supp. 656 (D.C. Mass. 1978).	34
Gercy v. United States, 540 F.2d 536 (1st Cir. 1976).....	34
Greer v. U.S., 505 F.2d 90, (5th Circuit 1974).....	41,44
Hogge v. S.S. Yorkmar, 434 F.Supp. 715 (D.C.Md. 1977).....	42
Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122	

<u>Cases:</u>	<u>Page</u>
(1955).....	28,37, 38,40, 44,49
In Re Holoholo, 512 F.Supp. 889 (D.C. Ha. 1981).....	59
In Re New York, 256 U.S. 490, 41 S.Ct. 588, 65 L.E. 1057 (1921).....	50
Knickerbocker Ice Co. v. Ste- wart, 253 U.S. 149, 40 S. Ct. 438, 64 L.Ed. 834 (1920).....	56
Lane v. United States, 529 F.2d 175 (4th Cir. 1975).....	27,34 35,36, 37,41, 44
Law v. Sea Drilling Corp., 523 F.2d 793 (5th Cir. 1975)...	58
Lynch v. United States Dept. of Army Corp. of Engineers, 474 F.Supp. 545, (D.C.Md. 1978), <u>aff'd without opinion</u> , <u>601 F.2d 581</u> (4th Cir. 1979).....	35
Magno v. Corros, 630 F.2d 1224 (4th Cir. 1980), <u>cert. den.</u> , 451 U.S. 970.....	39,40
Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed. 2d 1020 (1968).....	54
Mitchell v. Trawler Racer, Inc. 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960).....	31

<u>Cases:</u>	<u>Page</u>
Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978)...	28
Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.E.2d 339 (1970)...	28,29, 30,50, 56,57, 59
Norfolk and Wester Co. v. U.S., 641 F.2d 1201 (6th Cir. 1980).....	27, 28
Offshore Transportation Corp. v. United States, 465 F.Supp. 976 (E.D. La. 1979).....	34,41
Parden v. Terminal Railway Co. of Alabama, 377 U.S. 184, 12 L.E.2d 233, 84 S.Ct. 1207 reh. den., 377 U.S. 1010, 12 L.Ed.2d 1057, 84 S.Ct. 1903 (1964).....	28,50, 51,55 56
Red Star Towing and Transp. v. Dept. of Transp. of New Jersey, 423 F.2d 104 (3rd Cir. 1970).....	61,62
Reliable Transfer Co., Inc., v. U.S., 497 F.2d 1036 (2nd Cir. 1974), <u>aff'd</u> 421 U.S. (1975).....	44
Riggle v. State of California, 577 F.2d 579 (9th Cir. 1978).....	27,61

**Cases:****Page**

Sanitary District of Chicago v. The United States, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925).....	54
Sea-land Services v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) reh. den. 415 U.S. 986, 94 S.Ct. 1582, 39 L.Ed. 2d 883.....	28,30
Somerset Seafood Co. v. United States, 193 F.2d 631, 635 (4th Cir. 1951).....	48,54
The Seagull, 21 F. Cas. 909 (No. 12,578) (C.C. Md. 1865)....	30
The Snug Harbor, 40 F.2d 27 (4th Cir. 1930).....	34,46
The William C. Atwater, 110 F.2d 644 (2nd Cir. 1940)...	62
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 100 S.Ct. 242, 62 L.E.2d 146 (1979).....	63
Tringali Brothers v. U.S., 630 F.2d, 1089 (5th Cir. 1980)..	28,37, 41
United States v. Perma Paving Co., 332 F.2d 754 (2nd Cir. 1964).....	42
United States v. Reliable Trans- fer Co., Inc., 421 U.S. 397, 95 S.Ct. 1708, 44 L.E.2d 251 (1975).....	30

**Cases:****Page**

United Transportation Union v. Long Island Rail Road Co., <u>et. al.</u> , 455 U.S. 678, 102 S.Ct. 1349, 72 L.E. 2d 547 (1982).....	55,56
Universities Research Assoc., Inc. v. Coutu, 450 U.S. 754, 101 S.Ct. 1451, 67 L.E. 2d 662 (1981).....	63
Wyandotte Trans. Co. v. The United States, 389 U.S. 191, 88 S.Ct. 379, 19 L.Ed. 2d 407 (1967).....	54
Zabala Clemente v. The United States, 567 F.2d 1140 (1st Cir. 1977), <u>cert. den.</u> , 435 U.S. 1006 (1978).....	35

**Federal Statutes:**

28 U.S.C.A. §1333.....	26
33 U.S.C.A. §1.....	42
33 U.S.C.A. §401 .....	41
33 U.S.C.A. §403 .....	17,41 61
33 U.S.C.A. §406 .....	41
33 U.S.C.A. §409 .....	41
33 U.S.C.A. §411 .....	41
33 U.S.C.A. §413 .....	41
33 U.S.C.A. §414 .....	41
14 U.S.C.A. §81.....	41,44

<u>Federal Statutes:</u>	<u>Page</u>
14 U.S.C.A. §86.....	41,44
46 U.S.C.A. §741 <u>et. seq.</u> , The Suits in Admiralty Act...	26,33
46 U.S.C.A. §761 <u>et. seq.</u> , The Death on the <u>High Seas</u> Act.....	57,60
46 U.S.C.A. §688, The Jones Act..	57,60

State Statutes:

South Carolina Code §57-15-140 (1976).....	52
---	----

Acts:

Act 896 of Acts of 1934, 38 S. at L. 1539.....	53
Act 29 of the Acts of 1947, 45 S. at L. 44.....	2,52

Annotations:

19 A.L.R. Fed. 282.....	45
-------------------------	----

Regulations:

33 CFR 209 <u>et. seq.</u> .....	42
33 CFR §66.01-1 <u>et. seq.</u> .....	43
33 CFR 320 <u>et. seq.</u> .....	17,24

Treatises:

Restatement of Torts 2d §323, (1965).....	38
Restatement of Torts 2d §324 A	

<u>Treatises:</u>	<u>Page</u>
(1965).....	38
Restatement of Torts 2(nd) §343 (1965).....	46
Restatement of Torts 2(nd) §364 (1965).....	46
<u>Prosser, The Law of Torts,</u> p. 172 (4th Ed. 1971).....	46
<u>Constitution:</u>	
Amendment XI.....	50

### OPINION BELOW

The official Opinion of the United States Court of Appeals for the Fourth Circuit is found in Appendix B *infra*, pages B-1 to B-154 and is yet unreported. The official denial of the petitioner's petition and request for an en banc rehearing is found in Appendix A *infra*, pages A-1 to A-7 but is yet unreported. The Opinion of the District Court is found in Appendix C *infra*, pages 1 - 109 and is reported in 527 F.Supp. 1021 (D.C.S.C. 1981) .

### JURISDICTION

The judgement of the United States District Court of Appeals for the Fourth Circuit was entered on December 13, 1983 upon the denial of the petitioners' request for en banc rehearing. This petition was timely filed within ninety days as required by 28 U.S.C. §2101 (c). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

CONSTITUTION, TREATIES, STATUTES AND REGU-  
LATIONS

This case involves the Eleventh Amendment of the United States Constitution as well as the following Statutes, Acts and Regulations, all of which are set forth verbatim in Appendix E, infra, at pages E-1 to E-1-29. The citation for these materials are as follows:

33 U.S.C. §§401, 403, 406, 409, 411, 413, and 414

14 U.S.C. §§81, 86

46 U.S.C. §§742, et. seq., The Suits in Admiralty Act

46 U.S.C. §761, et. seq., Death on the High Seas Act

46 U.S.C. §688, et. seq., The Jones Act  
§57-15-140 South Carolina Code of Laws  
1976, as amended

Act No. 896 of the Acts and Joint  
Resolutions of the State of South  
Carolina, 1934, 38 S. at L. 1539

Act. No. 29 of the Acts and Joint  
Resolutions of the State of South  
Carolina, 1947, 45 S. at L. 44

33 C.F.R. 209 and various subparts.

33 C.F.R. 66.01-1 and various subparts.

33 C.F.R., 320 and various subparts.

## STATEMENT OF THE CASE

While the South Island Ferry possessed no patent harbingers of danger, it caused numerous instances of tragedy, death and destruction. One instance occurred on the night of December 11, 1977 when Charles L. Faust was killed and his two companions, Tommy Bennett and Curtis Muldrow, were injured when Faust's 18 foot motorboat boat struck an invisible 5/8 inch steel guide cable which spanned the width of the Atlantic Intracoastal Waterway, hereinafter A.I.W., approximately 3 to 4 feet above the water's surface.

On that morning, they left their homes in Florence, South Carolina for Georgetown, South Carolina, a distance of some seventy miles for a day of fishing in Faust's 18 foot motorboat on Winyah Bay, which abuts the Estherville-Minim canal, a part of the (A.I.W.). Shortly after their voyage began, they came upon "Happy" Hendricks, a

local commercial fisherman stranded in his disabled boat, who they picked up and who agreed to direct and accompany them to a good fishing area. As darkness approached, the four headed back to Hendricks' disabled boat which they then towed to another local landing. As they left Hendricks, they asked directions back to the "boat landing".

Mistakenly believing that they had put in at the South Island Ferry site landing, Hendricks directed them there. Following those misconceived directions, at about 6:10 p.m. Faust headed his boat from Winyah Bay into the Waterway, across which lay the ferry's invisible cable.

The South Carolina State Highway Department had operated this cable ferry for thirty years across the canal, admittedly part of the A.I.W. pursuant to Act No. 29 of the Acts of 1947, 45 S. at L. 44; §57-15-140 of the South Carolina Code of Laws (1976) in order to provide for trans-

canal transportation between the mainland and South Island (Appendix E-2 to p. E-5.) When at rest the ferry was located at South Island. In operation, the ferry was propelled across the 300 foot wide canal by a cable system and was guided and stabilized by a 5/8 inch steel cable permanently affixed to each side of the canal. The ferry operator controlled the engine (located on land) by a manual throttle operable only from inside the ferry's cabin. When the operator activated the engine even if the ferry was not yet underway, the steel guide cable became taut and rose approximately four feet above the water across the width of the canal, thus totally obstructing passage on the canal. (When the engine was not activated, the guide cable lay underwater along the bottom of the canal.) By 1977, it had become a muddy, brown color and was invisible at night.(Tr. Vol. I, p. 173)

On the evening of Faust's death, there were four sets of lighted "warning" signs consisting of three signs per pole within the waterway. Each sign was 500 feet north and south of the ferry on each side of the canal. The bottom sign on each pole bore the message: CABLE ABOVE WATER WHEN FERRY IN OPERATION. This legend conveyed the message that there was a cable stretched across the waterway when the ferry was "in operation", but most significantly, it failed to warn the boater that a cable was still stretched taut four feet above and across the waterway blocking passage even when the ferry was docked on the mainland side and did not appear to be "in operation". These "warning" signs and devices were insufficient and ineffective to adequately convey the true nature of the peril which lay ahead waiting to snare the unwary boater.

The ferry itself had 5 revolving red

lights like those used on fire trucks and a red strobe light atop its mast - all of which operated when the ferry was making a crossing. This mass of lights on the ferry itself distracted a boater's attention away from the "advance warning signs" located in the Waterway and to the ferry. The ferry also had on it a sign reading "Cable Ferry Stop on Red".

The steel guide cable itself was marked only by two highway stop signs. These "trailing stop signs" attached to the guide cable just behind the ferry and rose above the water's surface with the cable when the ferry's engine was on. These signs were not lighted and were not visible in the dark.

The ferry landing areas on both sides of the waterway were lighted with mercury vapor lights like those on city streets. Thus, it would appear to a boater in the nighttime, after his attention had been

attracted by the lights of the landing and those on the ferry itself, that the cable alluded to in the "advance warning signs" would no longer be stretched across the waterway since the ferry was docked against the mainland unloading cars, and since the ferry would not appear to be "in operation" since it was not moving. But, in order to avoid the hazard, an approaching boater in the nighttime, traveling at 20 miles per hour, assuming that he even saw the advance signs would within 18 seconds after passing them, have to unscramble the jumbled messages and conclude that a cable was still stretched above the surface of the water behind the ferry even though it was tied to a pier.

During the early evening of December 11, 1977, as Faust was steering his boat in accordance with Hendricks' directions, he neither slowed down nor altered his course and steered his boat straight and steady

down the center of the canal at 15 to 25 m.p.h. towards the ferry's 5/8 inch invisible steel guide cable which was taut and spanning the canal approximately 4 feet above the water. Faust's head was just above the level of the boat's windshield; Bennett stood beside Faust also looking out ahead and Muldrow sat behind Faust in a seat facing aft. The night was dark, clear and cold.

As Faust's boat passed the warning signs, one does not know what the decedent Faust saw or heard; one knows only that Bennett saw a "glur" ["blur"] - "something shining" to his left and heard the siren only upon the boat striking the cable. Muldrow did not see the signs either, and like Bennett, only heard the siren at the moment of impact.

The ferry operator was intermittently unloading automobiles on the mainland side of the canal. The ferry's lights were lit

but its siren was not being sounded continuously since the operator had to leave the cabin where the siren was controlled from time to time as the cars were being unloaded. As the boat passed under the cable, its windshield struck the cable and the impact hurled Faust to the bottom of the boat where he died from extensive injuries to his head, neck and back. Bennett was thrown from the boat into the frigid waters and Muldrow was tossed unconscious into the bottom of the boat. Thus, in this manner, the last of a series of some 40 accidents occurred involving boaters and this cable ferry.

Between 1940 and 1975 the ferry and its cable had been involved in approximately 40 accidents, most of which involved pleasure boats colliding with the cable. Many of these were investigated by the State and Coast Guard, the most significant

of which was in 1974 when Robert Fulton<sup>1</sup> was killed.

At that time, the warning system was somewhat different from that in December 1977. For example in 1974, the siren was operative only before the ferry began a crossing from the island side; not all warning signs were illuminated; and, relevant available nautical charts did not disclose that a cable ferry crossed the A.I.W.

Between the Fulton and Faust accidents, Coast Guard Commander Stewart, Marine Safety Officer for South Carolina on November 20, 1974, informed his superior of the cable hazard and indicated that approaching vessels, despite the warning signs, might not see the cable, but only the ferry. Stewart reported that he had consulted with officials from the Highway

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<sup>1</sup> Doyle v. United States 441 F.Supp. 701  
(D.C.S.C. 1977)

Department on November 18, 1974 and that agency was taking the following steps to improve the situation: installing a switch to allow the ferry operator to lower the guide cable when the ferry was moored on the mainland side; installing on the ferry a siren to be accessible to the operator at all times; putting up four additional signs to indicate more clearly the danger from the cable; looking into alternative means of providing access for South Island, including a bridge or self-propelled ferry; and cooperating with the Coast Guard to conduct a training program leading to the issuance of licenses for the ferry operators. Stewart advised his Commander that "...it is not in the best interest of the Coast Guard for this [ferry] to become a Coast-Guard vessel." He closed his letter by saying that "...[c]ompletion of the previously mentioned improvements should result in as safe an operation as is possible

with a cable ferry," though his recommendations to the Highway Department [would] contain a statement to the effect that "...the only permanent means of removing the hazard from the cable-type operation is to remove the cables themselves." (Emphasis added.)

On November 21, 1974, Stewart wrote Highway Engineer, Catoe, "...to provide [Catoe] with recommendations intended to assist ...in safety improvements at the South Island Ferry" and informed him that "...the only permanent means of removing this hazard is to remove the cables themselves." (Emphasis added.) Stewart suggested that, until that could be done, the State should make the changes described in his November 20 letter and further recommended that the guide cable be installed on a lower position on the ferry, so that the risk of injury to persons as opposed to vessels would be diminished.

On November 21, 1974, Catoe, in a memo to the Highway Engineer, indicated the following changes, approved by Commander Stewart, were to be implemented: installation of new advance warning signs, to be illuminated by 12-inch wig-wag warning lights; painting on the ferry of stripes in orange and white fluorescent paint; mounting on the ferry of one 3-foot by 16-foot warning sign on each side of the vessel; installation of a red strobe light on the mast of the ferry; installation of one red strobe light on each side of the waterway, to operate only when the ferry was in operation; and installation of a switch, to allow the guide cable to be lowered by the operator from the mainland side of the canal.

Catoe's memo requested the Highway Engineer's permission to make these changes and contained a postscript enclosing the additional recommendations made in Stewart's November 21 letter.

On December 5, 1974, Cobb replied to Catoe, approving the above changes and further directed Catoe to comply with the terms of Stewart's November 20 letter and to give consideration to the changes suggested in Stewart's November 21 letter.

Between October, 1974 and October, 1975, the Highway Department made only some of the improvements recommended by Stewart and approved by Cobb. Most importantly though, the plan to install a switch to permit the lowering of the cable from the mainland side was never implemented, nor was the guide cable ever placed at a lower position on the ferry. Either measure would almost certainly have prevented the petitioners' injuries, yet Stewart never bothered to follow up to see if any of his directives had been carried out.

Between November, 1975 and April, 1977, the Highway Department, inter alia, installed back-up sirens on the "advance

warning signs" north and south of the ferry; erected a warning sign at the landing next to the ferry site; placed on the ferry itself a fluorescent striped warning sign; and, installed the trailing stop sign.

On April 1, 1977, District Judge Sol Blatt, after concluding the trial on March 28-31, 1977 of Doyle v. United States, supra, wrote Cobb a letter which stated in part:

Despite the number of accidents prior to the fatal accident [involving Fulton] and the warnings and letters written since October, 1974, very little has been done to remedy the situation existing at the South Island ferry. Not only did testimony reveal what I think is the most dangerous hazard to navigation that can be imagined, but at the request of counsel for both sides, I visited the scene, and in my opinion, the situation was even more dangerous than I had anticipated...I am thoroughly convinced that someone else will be killed or badly injured unless you do review your files on this crossing and install a safer method than is now used.

This letter predicted, with an eerie fore-

sight, the Faust tragedy which was to occur within seven months.

On April 6, 1977, the Commander of the Coast Guard District in Miami wrote Commander Stewart's successor, as Officer in Charge of Marine Inspection for the South Carolina zone, to advise him that during the Doyle trial, it had come to light that: "the condition set up in one of the letters from Commander Stewart, for additional signs approximately 1000 feet up and down the waterway from the ferry cable, has not been complied with; the ferry was carrying more passengers than permitted by law; the duties required of the ferry operator prevented him from keeping a proper lookout; and the ferry appears to operate with an absolute minimum of supervision, by anyone who is concerned with, or has knowledge of, maritime law and regulations."

On April 7, 1977, Cobb replied to Judge Blatt's letter and stated that he

felt that all feasible safety suggestions from the Coast Guard had been implemented. He also stated that the Highway Department was discussing with the South Carolina Attorney General four alternatives: (1) Continue operation of the present ferry, with the resulting liability that may be involved; (2) Change the present ferry operations to a self-propelled type which would involve a substantial expenditure; (3) Construct a bridge or structure to the island for which the Department has no program for funding, or; (4) Discontinue the ferry operation (emphasis added). It was the callous approach set forth in alternative number (1), which preferred money to saving lives, that was chosen.

On May 16, 1977, Captain Mitchell of the Coast Guard's office of Marine Safety in Charleston, S.C., wrote Catoe advising him inter alia to advise the ferry operators to maintain a proper lookout, and,

that if the operators were given a flashlight they could warn approaching vessels of the cable at night by shining the light on the cable and the stop signs attached to it. But the operators were never equipped with flashlights.

On August 17, 1977, the Corps concluded that it had responsibilities concerning the operation of the South Island ferry. On that date the Corps' Acting Division Engineer of the South Atlantic Division in Atlanta wrote Colonel Brown, the District Engineer of the Corps in Charleston, S.C., and stated in part:

2. Ferry cables are subject to regulation by the Corps...under Section 10 of the 1899 Rivers and Harbors Act. This finding is substantiated by the reference to requirements for ferry cables on page 4, paragraph 11, of EP 1145-2-1 dated October 1974 (Gray Book) and 33 CFR 322.5(1) (3) printed 19 July 1977 in the Federal Register.

3. Inasmuch as the cables have been found by a Federal District Court to be dangerous and a hazard to navigation, the District should coordinate with the State and the Coast Guard to

determine if additional warnings and/or posting is warranted and to seek voluntary removal of the cables. In the event that you are unsuccessful in voluntary removal, the District should take appropriate legal action concerning a 403 structure...(Emphasis added.)

On September 8, 1977, Brown wrote the new Highway Engineer, Mr. Coffey, and requested a meeting with Highway Department officials, "to formulate a course of action to abate any existing or foreseen hazard to navigation which [the ferry] may pose." Brown stated that "the Corps of Engineers is the federal agency primarily responsible for this type of activity, and has the lawful authority to permit and/or regulate its continued operation."

At an October 14, 1977, meeting between the Corps, the Coast Guard, the Highway Department, and the S.C. Wildlife and Marine Resources Department, the Coast Guard Commander stated that he had viewed the warning system at the ferry and found

it adequate. A representative of the Corps, however, stated that the present operation of the ferry was hazardous and that it was only a matter of time before the Corps would have to close it.<sup>2</sup> Accordingly, the State knew between August 17, 1977 and October 14, 1977, that in effect, the ferry's authorization had been revoked and that the cable ferry could no longer be permitted to operate in that manner. Nevertheless, the Highway Department continued to ignore the Corps' directives until an additional accident involving the cable occurred on October 23, 1977 in which three persons were injured.

On October 28, 1977, Brown prompted by the recent accident, sent a telegram to Coffey requesting a meeting to develop a remedy to the ferry situation and directed

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<sup>2</sup> Tr. p. 671, 1.1. 16 to 25; p.672, 1.1. 1 - 5; plaintiff's Exhibit No. 21.

the Highway Department, pursuant to authority vested in the Corps pursuant to regulations promulgated under the Rivers and Harbors Act of 1899, to minimize the operation of the ferry.

On November 8 and 17, 1977, Coffey wrote Brown, that a proposed revised schedule would reduce the ferry crossings from more than 30 per day to 24. Coffey also stated inter alia that a back-up siren would be installed on each side of the ferry and 5 m.p.h. speed limit signs for boats in the canal had been erected on each side of the ferry crossing.

On November 18, 1977, Judge Blatt, in Doyle vs. U.S., 441 F. Supp. at 701, held that the injuries to the Doyle plaintiffs were caused by the negligence and abuse of discretion of the Corps and the Coast Guard in failing to adequately warn vessels of the danger of the ferry cable and in failing to take steps to improve the safety of

the situation.

On November 22, 1977, Brown wrote Coffey, in response to his November 8 and 17 letters, that a proposed ferry operation schedule was unacceptable since it would result in only a 25% reduction in the number of crossings. Brown directed the Highway Department to have in effect by December 2, 1977 a plan to further reduce the the number of crossings, by scheduling "minimal operation of the ferry to serve the needs of the South Island residents only"; alter the wording of the "existing warning signs...to stress the fact that there is a cable across and above the water surface when the ferry is in operation"; and, submit as agreed in the November 3 meeting, by December 2, 1977, "plans for a permanent solution which will result in complete removal of the cable associated with the South Island ferry."

On December 1, 1977, Coffey advised

Brown that the Highway Department would post flagmen with flashlights and public address systems in boats upstream and downstream of the ferry in hope that this compromise plan would be acceptable.

By separate letter of December 1, 1977, Coffey wrote Brown confirming the extension of the deadline to December 5, 1977, for the Highway Department's submission of plans for a permanent solution to the ferry problem. Coffey further stated that his Department and others contemplated taking prompt action to obtain funding for a permanent solution.

On December 6, 1977, the Highway Department installed the four bottom signs reading CABLE ABOVE WATER WHEN FERRY IN OPERATION. On December 9, 1977, Brown wrote Coffey that the Highway Department's plans to implement the revised schedule, add warnings to the existing signs, and post flagmen in the canal "were satisfactory and

in compliance with [Brown's] latest instructions and reiterated "[the Corps'] serious concern over the [ferry cable hazard] and [urged] that [the Highway Department] secure an early removal of [the] cable." But, Brown neither set time limits, nor took actions to verify the State's compliance with these directives.

Only after the Faust collision on December 11, 1977 did the two governments move with any sense of urgency to remove the acknowledged hazard. On December 12, 1977 the Highway Department belatedly authorized the hiring of flagmen to operate the advance warning boats previously proposed by Coffey. Also, Highway Department Officials began corresponding with an engineering firm regarding a self-propelled ferry. Specifications for the new self-propelled ferry were completed in January 1978 and a contract was let in February 1978.

In the meantime, on January 26, 1978,

Brown wrote Cobb, the new Chief Highway Commissioner, a highly suspect and self-serving letter stating:

In accordance with...33 CFR 322.4(a)[sic], I have determined that the South Island ferry is a permitted structure since the cable was installed prior to 18 December 1968 and there was no evidence available to the Corps to indicate it posed a hazard to navigation before the recent accidents.

Based upon the evidence presented and the recent findings by a Federal District Court Judge, I have determined that continued operation of the cable ferry constitutes a hazard to navigation in the area. In accordance with 33 CFR 325.7..., I have reevaluated the circumstances and conditions of the South Island ferry permit and have determined that suspension of the permit is in the public interest...

In the interim I consider that continued modified operations currently in effect may continue until 3 March 1978. At that time total suspension of the operation of the cable ferry must occur unless you receive approval for operation from this office.

The March 3, 1978 deadline referred to in the above letter was, as usual, put off until April 29, 1978 when the self-

propelled ferry was put into operation at a cost of approximately \$100,000.00. The total cost of the new ferry was paid by the Highway Department out of funds on hand before December 11, 1977 and it was fully operational four months after Faust's death.

Despite the fact that the Corps had jurisdiction over the ferry site and was charged with the responsibility of removing obstructions in navigable waters it failed to responsibly exercise its authority to remove the admitted and acknowledged hazard to navigation. Despite the fact that the Coast Guard was charged with the duty of responsibly marking obstructions in navigable waters and with the duty of responsibly maintaining and approving aids to navigation, it too failed to responsibly exercise its authority and duty to responsibly sign and mark the acknowledged hazardous crossings. And, despite the fact that the

South Carolina legislature had made the State the owner and operator of the ferry, and despite the well known risks involved in its continued operation, the Highway Department nevertheless opted to "...continue operation of the present ferry, with the resulting liabilities that might be involved."

After the Faust collision, suit was brought against the United States and State of South Carolina as joint tort feassors for the wrongful death of Faust and the personal injuries of Bennett and Muldrow. Jurisdiction was conferred by 28 U.S.C. §1333 and 46 U.S.C. §742, et. seq. (SIAA), The Suits in Admiralty Act. After a bench trial, a verdict was rendered for the petitioners. The Court of Appeals panel then reversed the District Court and set aside the judgment rendered against both defendants. In a 2-1 decision, the Court of Appeals held that the United States owed no

statutory or common law duty to the petitioners with respect to the cable because the ferry was a "permitted" structure and that the United States had unreviewable discretion to ameliorate the hazard and owed no duty under Indian Towing. The Court further concluded that the Eleventh Amendment insulated the State from a judgment in Federal Court. A petition for an en blanc rehearing was denied on December 13, 1983.

## REASONS FOR GRANTING THE WRIT

### Introduction

Certiorari should be granted because the Fourth Circuit has issued an opinion in conflict not only with itself, but also with numerous decisions of other Courts of Appeal. See, Lane v. United States, 529 F.2d 175 (4th Cir. 1975); Riggle v. State of California, 577 F.2d 579 (9th Cir. 1978); DeBardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971); Nor-

folk and Western Co. v. U.S., 641 F.2d 1201 (6th Cir. 1980); and Tringali Brothers v. U.S., 630 F.2d, 1089 (5th Cir. 1980). Additionally, certiorari should be granted because the Fourth Circuit has so far departed from the well accepted general principles of admiralty law as to require this Court's exercise of its supervisory powers. See Indian Towing Co. v. United States, 350 U.S. 61,76 (1955); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Mobile Oil Co. v. Higgenbotham, 436 U.S. 618 (1978). These departures concern such important questions of federal maritime law that the issues need to be resolved by this Court within the context now presented.

Additionally, certiorari should be granted because the Fourth Circuit's decision is at odds with the Supreme Court's holding in Parden v. Terminal Railway, 377

U.S. 184 (1964) as it has been tempered, and with its progeny of cases finding a waiver of Eleventh Amendment immunity in certain instances where the State's activities are intimately intertwined within exclusive Federal spheres such as Admiralty or Commerce. Left confused and unsettled by the Circuit Courts are crucial questions of Federal Admiralty law, i.e. whether the Employees' doctrine and its progeny applies in Admiralty and whether this Court may judicially declare a waiver just as clearly as Congress in the Admiralty field. See, Moragne.

Admiralty jurisprudence, and its uniquely judge-made law, has always been inspirited with a "...special solicitude for the welfare of those men who undertake to venture upon hazardous and unpredictable sea voyages... ." Moragne v. States Marine Lines, supra, at 387; American Export Lines, Inc. v. Alvez 46 U.S. 274, 100 S.Ct. 1673, 1679-1680, 64 L.Ed.2d 284 (1980). It

is a settled canon of maritime jurisprudence that "...it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy when not required to withhold it by established and inflexible rules... ." American Export Lines, Inc. v. Alvez, supra, at 1677 citing Moragne, supra, at 387, quoting with approval, The Seagull, 21 F.Cas. 909, 910 (No. 12,578) (C.C. Md. 1865); accord, Sea-Land Services v. Gaudet, supra, at 583. Accordingly, consistent with the extension of this special solicitude and benevolence to the dependants of [seafarers], this Court should approach the resolution of the issues now before it, especially since the Supreme Court, and not Congress has the primary responsibility for "...formulating flexible and fair remedies in the maritime law... ." See U.S. v. Reliable Transfer Co., Inc., 421 U.S. 397, 409 (1975). Because Congress has largely left to the Federal Judiciary

the responsibility for developing the controlling rules of Admiralty Law, and because "no area of federal law is judge made at its source to such an extent as the law of Admiralty"<sup>3</sup>, the Fourth Circuit should not have ignored the numerous judicial comments and case law which have developed around the landmark case of Moragne.

If the law is in fact as the Fourth Circuit has said it to be, then the Coast Guard, Corps of Engineers and State Highway Department may flout danger, act with impunity, and totally avoid all consequences of their irresponsible conduct. In light of the within facts, these defendants should not be allowed to escape the consequences of their unconscionable conduct and cavalier attitude towards this deadly hazard merely because of the inherently pro-

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<sup>3</sup> (Frankfurter, J.) Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960)

protective shield sometimes afforded to governmental conduct inasmuch as private parties would have clearly been liable for this negligence. Their callous disregard for human life, in light of their knowledge and understanding of the extreme hazard involved, should not have been tolerated. Moreover, this Court's resolution of these issues should be made in conformity with the emerging trend of admiralty law as espoused by this Court. In view of the actions of the Court of Appeals in setting aside the petitioners' award for damages and holding the respondents not liable, the issues raised by this petition call for this Court's exercise of its supervisory powers.

# I

THE UNITED STATES COAST GUARD AND  
CORPS OF ENGINEERS OWED PETITIONERS A  
DUTY IN ADMIRALTY AND THEY BECAME LI-  
ABLE FOR THEIR FAILURE TO RESPONSIBLY  
MARK, SIGN, OR IN THE ALTERNATIVE RE-

MOVE THE KNOWN HAZARD TO NAVIGATION  
WHICH THEY HAD ACTIVELY UNDERTAKEN TO  
REGULATE AND CONTROL.

A. The SIAA and The Nonapplicabil-  
ity of the Discretionary Function  
Exemption

In reversing and setting aside the pe-  
titioners' judgment against the United  
States, the Court of Appeals held as a  
matter of law that the United States owed  
no statutory duty to the petitioners. The  
majority reasoned that the Corps had an  
unreviewable discretion either to issue a  
permit or not to revoke its permit and that  
the Coast Guard had wide discretion whether  
or not to mark a "permitted structure".

Faust was properly brought against the  
United States under the Suits in Admiralty  
Act, (SIAA), 46 U.S.C.A. §741 et. seq.,  
for a maritime tort caused by the govern-  
ment's negligence inasmuch as the SIAA con-  
templates that suit may be brought against

the United States in every instance where if a private party were involved, an admiralty proceeding could be maintained. Lane v. United States, supra, The Snug Harbor, 40 F.2d 27 (4th Cir. 1930); DeBardleben Marine Corp. v. U.S., supra,; Gaspar v. United States, 460 F.Supp. 656 (D.C.Mass. 1978); Offshore Transp. Co. v. U.S., 465 F.Supp. 976 (D.C.La. 1979); Doyle v. United States, supra. While there is a conflict of authority in some circuits, the Fourth and Fifth Circuits have expressly found that no "discretionary function exemption" exists in the SIAA whereas the First Circuit has taken the opposite view. Compare Lane, supra,; DeBardleben, supra, and Gercey v. United States 540 F.2d 536 (1st Cir. 1976). The Supreme Court has never spoken specifically to this very important question of Federal law on which various Courts of Appeal have reached different conclusions.

Unlike in the SIAA, this discretionary function exemption, is generally regarded

(FTCA), 28 U.S.C.A §2674, et. seq. Thus, there can be no parity of reasoning between SIAA cases and FTCA cases. Nevertheless, the Fourth Circuit placed unjustified reliance in Faust on FTCA cases, which could not help but yield the wrong results and a conflict between the circuits. Appendix B p.p. B-16 to B-19 citing Zabala Clemente v. United States, 567 F.2d 1140 (1st Cir. 1977) (decision that FAA employee's failure to warn passengers that the aircraft they were about to embark on was overweight and lacked proper flight crew did not give rise to a cause of action under FTCA; Boston Edison Company v. Great Lake Dredge and Dock Company, 423 F.2d 891 (1st Cir. 1970) (decision by Corps of Engineers to dredge river is discretionary, and so is not actionable under FTCA; Lynch v. United States Depart. of Army Corps of Engineers, 474 F.Supp. 545, 550-552 (D.C.Md. 1978), aff'd without opinion 601 F.2d 581 (4th Cir. 1979) tort of negligence or negligent mis-

representation is barred by discretionary function exemption of FTCA). Thus, by refusing to find either the Coast Guard or the Corps liable once having exercised their discretion to act or not to act on the ferry hazard, the Fourth Circuit created further conflict amongst the circuits and even with itself by finding the FTCA discretionary function exemption applicable in SIAA cases as well. See Lane, supra, which requires that discretionary acts of the Coast Guard and Corps be exercised responsibly. According to the Court of Appeals, however, the government's discretion to mark, or its discretion to regulate, raised no duty and was no basis for holding the United States liable. Here, the United States was faced with a known hazard which it had condemned regardless of its being "permitted" or "unpermitted". In extending immunity to the government, the Court of Appeals ignored its own teaching that "...duty is born of a danger to others

reasonably perceived by the person charged with guarding against the hazard." See Dalldorf v. Higgeson-Buchanan, Inc., 42 F.2d 419, 427, (4th Cir. 1968).

B. The Indian Towing Argument

Further conflict in authority was created by the Fourth Circuit's failure to apply the "Good Samaritan" precepts of Indian Towing upon which much admiralty jurisprudence is based.<sup>4</sup> See, Indian Towing Co. v. United States, supra; Lane v. United States, supra, Tringali Brothers, supra. In failing to apply Indian Towing the court severely departed from a well accepted theory of liability in maritime matters and thereby requires this Court's exercise of its supervisory powers. Furthermore,

<sup>4</sup> These "good samaritan" precepts of Indian Towing provide that once the Coast Guard or Corps of Engineers exercises its discretion and voluntarily undertakes to remedy a known hazard, (regardless of the existence or non-existence of a prior duty and regardless of ownership of the instrumentality involved), they must act in a reasonable and prudent manner and may become liable for their negligence.

conflict was created by the Fourth Circuit's blanket finding that Indian Towing was inapplicable since the Federal Government did not "own" the ferry, but the issue of ownership is wholly irrelevant to the question of liability under Indian Towing. Id. at 53. These principles of law are well accepted and are reiterated by the Restatement of Torts 2d §323 entitled, Negligent Performance of Undertaking to Provide Services, and §324 A, entitled Liability to Third Persons for Negligent Performance of Undertaking.

It is important to remember that the Fourth Circuit did not disturb any of the District Court's findings of facts, one of which found that the government-ordered "safety" devices and procedures as installed and implemented at the ferry "actually increased the risk caused by the cable ferry." 527 F.Supp. at 1044. Thus, Faust is actionable under Indian Towing since the government's remedial measures misled the

boaters and were a proximate cause of the accident. The Fourth Circuit previously acknowledged such a cause of action could exist in Magno v. Corros, 630 F.2d 1224 (4th Cir. 1980) but it misapplied and misanalogized Magno to Faust and the Indian Towing principles contained therein.<sup>5</sup>

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<sup>5</sup> The United States has argued in Faust that Magno exculpates the conduct of the Coast Guard and the Corps; this however, is not a correct reading of that case in light of the facts in Faust. In Magno, the United States was absolved of negligence in its decision to mark in a certain way a certain aid to navigation which was an obstruction to navigability. Magno determined the dike in question to be an aid to navigation. Id. 227. There has never been any contention by the parties that the ferry and ferry cable in Faust were aids to navigation - only that the "advance warning signs" were such aids.

Secondly, Magno is inapposite to Faust in that there, the Coast Guard "...undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking..." Id. at 228. However, in Faust, the Coast Guard and Corps undertook to devise and implement an entire warning system so as to properly and effectively mark the overall ferry operation and apprise approaching boaters of the navigational hazards ahead.

Thirdly, the Court in Magno found the record "...entirely void of any evidence showing that the light would somehow induce a boater to believe that there was nothing between [the dike] and land..." Id. at 228. However, in Faust, there was substan-

Because, Faust is not a Magno type case, but rather a Lane case, the United States can be held liable for its failure to responsibly exercise its discretion to effectively mark and/or remove the known hazard to navigation once it undertook to regulate, control and remedy the dangerous ferry situation. A substantial body of law supports application of Indian Towing principles but the Fourth Circuit

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<sup>5</sup> tial testimony and evidence from several sources which indicated how the signs, markings and warning system could easily mislead a boater about the true nature of the peril with which he was confronted, thereby inducing him to believe that it would be safe to proceed when the ferry was docked against the mainland bank. Moreover, in Magno the Court found the Coast Guard never undertook to provide additional lights or markings on the dike; this, however, was clearly not the case in Faust inasmuch as the additional signs, markings, lights and warning devices installed were a direct result of the interaction and direction between the Coast Guard, Corps, and Highway Department. Thus, while the activities in Magno might not have been found to have engendered reliance on the additional markings, there was ample support in Faust that the additional markings there engendered the detrimental interpretation of the danger at hand. While in Magno there was nothing to indicate that the single light at the end of the dike was a trap for the unwary, the record in Faust is replete with testimony supporting the conclusion that the ferry warning system was a trap for the unwary.

departed from the accepted view and created conflict among the circuits and within itself. See, Lane, supra, Greer v. U.S., 505 F.2d 90, 92, (5th Cir. 1974); Tringali Brothers v. U.S., supra.

### C. Statutory Liability

As stated in Offshore Transp. Company v. U.S., supra, at 980, it is the need of maritime navigation that is the touchstone for determining whether the Coast Guard and Corps have acted responsibly in the exercise of their discretionary authority to protect vessels from obstructions or hazards. Read together, there can be no doubt but that 14 U.S.C.A. §§81, 86 and 33 U.S.C.A. 401 et. seq. are intended to protect maritime traffic from the danger posed by obstructions to navigation.

33 U.S.C. §§401, 403, forbid certain structures in navigable waters without permission. 33 U.S.C. §406 provides authority, couched in discretionary terms, to en-

force both 33 U.S.C.A. §§401, 403 although it is well accepted that such statutory authority is not needed. See U.S. v. Perma Paving Co. 332 F.2d 754, 758 (2nd Cir. 1964). Nevertheless, the Corps and Coast Guard procrastinated and never brought forth the full force of their authority to resolve the known dangers and hazards to navigation until it was much too late.

As a matter of practice, the Corps did not adequately supervise the navigation in the canal and it must be liable for the resulting damages. See Hogge v. S.S. Yorkmar, 434 F.Supp. 715 (D.C.Md. 1977). In addition to the above statutes, the Corps' duty stems further from 33 U.S.C. §1 and its own regulations promulgated pursuant to that statute at 33 C.F.R. 209, et. seq.

The statutes and regulations give the Corps plenary power and responsibility for the supervision of the waterway. For instance, the regulations define an aid to

navigation as "any device external to a vessel intended to assist a navigator to determine his position or safe course or warn him of dangers or obstructions to navigation". 33 C.F.R. 66.01-5 (a). Under 66.05-40, the Corps also has control over state aids to navigation. Having such power and duty it is therefore charged with issuing safe procedures governing the passage of vessels through the canal. In the face of this heavy responsibility, the Corps' efforts were plainly inadequate. The Fourth Circuit's limited view of the Corps' responsibility [by comparison to FTCA cases] does not adequately account for the Corps' plenary power as the overall supervisory agency in charge of the canal. The Corps simply cannot delegate away these responsibilities.

The District Court record clearly shows that the Corps and the Coast Guard failed to adequately supervise and enforce

safe operating procedures. As previously stated, if the government undertakes to perform a certain function (whether or not it had an original duty to perform that function) it must perform it with due care. Indian Towing, supra. Numerous other cases have held the government (usually the Coast Guard) liable for its negligent performance of a gratuitous undertaking (often for failure to place or maintain an aid to navigation in accordance with 14 U.S.C. §§81, 86). See, e.g., Greer v. U.S., supra, (failure to return to its proper place a buoy which had drifted from its chartered position); DeBardleben Marine Corps v. U.S., supra, (dissemination of an inaccurate chart); Reliable Transp. Co. v. U.S., 497 F.2d 1036 (2nd Cir. 1974) aff'd, 421 U.S. 397 (1975) (failure to maintain a light); Afran Transp. Co. v. U.S., 435 F.2d 213 (2nd Cir. 1970) (failure to replace a wandering buoy); Lane v. U.S., supra,

(failure to responsibly mark a known hazard to navigation); 19 A.L.R. Fed. 282. Although these cases refer to a particular negligent act or omission regarding a single aid to navigation, they are equally persuasive where, as here, the entire administration of the Canal lacked the careful planning and supervision required for such an undertaking. The Coast Guard and Corps undertook the responsibility of supervising navigation of the canal; indeed they were required to by their statutes and regulations. Their slipshod performance of these duties of supervision forces the conclusion that their entire operation of the Canal lacked due care. While such conclusion is warranted by examination of other Circuit's cases, as well as some Fourth Circuit cases, the Court of Appeals chose to depart from those well-accepted theories of liability despite ample law that the United States may be liable for its failure to

follow its own navigational laws. Eastern Transp. Co. v. United States, 272 U.S. 675 (1927); The Snug Harbor, supra.

D. General Tort Liability

The general tort rule as to whether one owes a duty to anticipate the negligence of others is well stated by Prosser, The Law of Torts, p. 172 (4th Ed. 1971). Basically, such duty exists when the probability of negligence is relatively high, the magnitude of harm which will result relatively great, the burden of exercising due care relatively slight. Id. This is precisely the situation with which the Corps, Coast Guard and Highway Department were faced. Further principles upon which liability may be founded against the United States are set forth in The Restatement of Torts 2(nd) §343 entitled "Dangerous Conditions Known To or Discoverable by Possessor", §343 (a), entitled "Known or Obvious Dangers", and §364, entitled "Creation or

Maintenance of Dangerous Artificial Condition". Therein, the law establishes the incumbent duties and liabilities of a party in the position which the United States finds itself in the instant case. These principles are equally applicable in Admiralty and in fact are often applied, yet were ignored by the Court of Appeals. Such nonstatutory principles of Admiralty Law, akin to principles of tort, make the United States liable. For example, where the United States, as the government which owns, controls, and exercises paramount power with respect to marine highways on navigable waters expressly or impliedly licenses another to create and maintain in such waters a dangerous structure, and the United States knows of that danger and does less than a reasonable prudent person would do to remove or alter or prohibit the structure, and such failure causes injury to a third person, then the United States

is liable for such injury.<sup>6</sup>

Thus, when the United States knows of a hidden danger and undertakes to mark it, it is subject to liability if the marking constitutes "a trap for the ignorant or unwary, rather than a warning of danger".

See Somerset Seafood Co. v. U.S., 193 F.2d 631, 635 (4th Cir. 1951). The duty to warn arises from knowledge by the United States of the hidden danger and its satutory authority to implement corrective measures independently of the ownership, construction, maintenance or operation of the dangerous obstruction. Doyle v. U.S., supra. Accordingly, whether the United States' negligence arises from a uniquely governmental activity such as marking obstructions and operating lighthouses, or from proprietary activities similar to those un-

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<sup>6</sup> See dissenting opinion, Faust, Ap. B, p.p. B-77 to B-79.

dertaken by private persons, such as operating motor vehicles on a public highway, is of no consequence for the United States' liability does not depend on the presence or absence of identical private activity. See Doyle, supra, at 709 citing Indian Towing, supra.

## II

THE STATE OF SOUTH CAROLINA WAIVED ITS ELEVENTH AMENDMENT IMMUNITY AND IS LIABLE IN ADMIRALTY FOR THE DAMAGES AND INJURIES SUFFERED BY FAUST, BENNETT AND MULDROW.

### A. Introduction

Although the majority panel held the Eleventh Amendment barred the District Court judgment, the Court of Appeals stated that if the State were amenable to suit, it should be held liable for its negligence. (Ap. B, p. B-24.) In holding that South Carolina was insulated from liability, the majority found that the Fourth Circuit de-

cision in Chesapeake Bay Bridge and Tunnel Districts v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), and this Court's decision in Parden had been sharply curtailed by the decisions in Edelman and Employees.

The Eleventh Amendment does not literally apply to admiralty actions although this Court has found it to govern certain admiralty proceedings. See, Florida Department of State v. Treasure Salvors, 102 S.Ct. 3304, 3314, n.17 (1980); In re New York 256 U.S. 490, 500 (1921) (both cases were in rem admiralty proceedings to recover property allegedly owned by the State). However, even if the Eleventh Amendment were to apply in Faust the State should be found to have waived its immunity under its unique facts either under Parden or under the general maritime law established in Moragne.

B. Waiver Pursuant to Parden

Waiver of Eleventh Amendment Immunity

has been found in two general situations; first, when there has been a "clear statement" by Congress that a state's waiver of immunity is intended, and, secondly, when the State engages in activity in an area in which they have empowered the federal government to act. Compare, Employees v. Missouri Public Health Department, 411 U.S. 279 (1973); Edelman v. Jordan 415 U.S. 651 (1974); Parden v. Terminal Railway 377 U.S. 184 (1964). In Faust, the State's ownership and operation of the ferry within the (A.I.W.) created an intimate nexus with the exclusive federal powers over commerce and admiralty and subjected it to Federal control. This is to be distinguished from Edelman and Employees where the Court refused to find a waiver where the States' only activity was as a mere participant in a Federal program. It is significant to realize that Faust is not a "mere entry" case as the Fourth Circuit categorizes Lau-

ritzen. Accordingly, the unique and interwoven relationship between the State's and government's activities and controls over the ferry operation in Faust allows it to withstand an overturning of Lauritzen and further allows for a finding of waiver under Parden.

The State was intimately involved within the federal spheres of Admiralty and Commerce. For example, it assumed ownership and operation of the ferry pursuant to direct legislative enactment. Act No. 29 of the Acts of 1947, 45 S. at L. 44; §57-15-140 of the South Carolina Code of Laws 1976 as amended. (Appendix E at p.p. E-2 to E-5.) The State undertook its operation voluntarily and with knowledge of its encroachment into the federal sphere. Moreover, the legislature specifically chose not to include a clause excluding the Highway Department from liability for negligence, personal injury, death or property

damage, as it had done in another existing ferry statute, thereby giving rise to the inference that the Highway Department could be sued for its negligence in operating the South Island Ferry. Compare, Act. No. 896 of the Acts of 1934, 38 S. at L. 1539, which specifically provided that the Highway Department would not be liable for its negligence, etc. (Appendix E, p.p. E-6 to E-8.) Furthermore, the State's operation of the ferry was completely subordinate to the authority of the Coast Guard and Corps from which it constantly took directions and with which it actively worked in an effort to comply with the standards of care imposed by general maritime law and the applicable regulatory statutes.

It is well settled that the federal government, when acting within a delegated power, [such as admiralty or commerce] may override countervailing state interests whether those interests be described as

governmental or proprietary. See Sanitary District of Chicago v. United States 266 U.S.405 (1925); Maryland v. Wirtz, 392 U.S. 183, 195-196 (1968) reversed on other grounds, Somerset Seafood Co. v. United States, supra. For example, the Federal Government is charged with insuring that navigable waterways, like any other routes of commerce over which it has assumed control, remain safe and free from obstruction. See, Sanitary District, supra, and Wyandotte Trans. Co. v. United States, 389 U.S. 191 (1967). Recalling Justice Holmes' language in Sanitary District, supra, the federal power over commerce is "...superior to that of the states to provide for the welfare or necessities of their inhabitants..." Sanitary District, supra, at 426. Thus, liability may be imposed upon the State, and its waiver of Eleventh Amendment immunity may be predicated upon its intimate activities within the

exclusive federal spheres of commerce and admiralty in conjunction with its activities under the supervision of the Corps and the Coast Guard. Parden, supra.

The vitality of the Parden exception was continued by U.S. Transp. Union v. Long Island Rail Road Co., 455 U.S. 678, 684-687 (1982). There, in a case closely analogous to Faust, this Court found that the Tenth Amendment did not prohibit application of the Railway Labor Act for a state-owned railroad engaged in interstate commerce since its operation was not an integral part of traditional State activities generally immune from Federal regulation. Id. at 685. Federal regulation of a state-owned railroad [or a state-owned ferry] does not impair a State's ability to function as a state. Id. In view of the fact that the commerce clause grants Congress the plenary authority to regulate labor relations in the railroad industry

[and that the exclusive grant of judicial power in Admiralty in Article III coupled with the Necessary and Proper Clause has long been considered by this Court to be a grant of exclusive power in that area to Congress]<sup>7</sup> an application of federal authority to a state-owned railroad [or ferry] does not impair the rights of a state so as to come into conflict with the Tenth or Eleventh Amendment, especially since the states, merely by acquiring functions previously performed by the private sector may not erode federal authority in areas traditionally subject to federal or statutory regulation. Id. Nevertheless, the Fourth Circuit failed to follow the teachings of Parden and Long Island Railroad.

C. Waiver under Moragne

Additionally, waiver of the state's

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<sup>7</sup> Knickerbocker Ice Co. v. Stewart, 353 U.S. 149 (1920)

Eleventh Amendment immunity can be implied under the general admiralty and maritime law established by Moragne which created a federal nonstatutory cause of action for maritime wrongful death in state territorial waters. Moragne was intended to bridge the gap which existed as a result of the causes of actions allowed by the Jones Act, 46 U.S.C. §688, et. seq. and The Death on the High Seas Act (DOHSA), 46 U.S.C. 761, et. seq., i.e. that there was no actionable statutory federal remedy for a nonseaman injured within territorial limits until Moragne.

This right of action was created by the Supreme Court in Moragne in its capacity as the final arbiter of admiralty law and procedure. The remedy was not created by the Congress, but rather by the Judiciary, and it was a "clear statement" no less powerful or effective than that contemplated in Edelman and Employees.

After a study of legislative history of (DOHSA) in Moragne, the Supreme Court concluded that Congress expressed:

...No intention...of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law. Id. at 1787

Accordingly, a "clear statement" from Congress (such as in Edelman and Employees) is not the only means by which a waiver can be effected since for all practical purposes, such a "clear statement" could come equally well from the Judiciary. And, such a "clear statement" has come from the Judiciary in Moragne. As recognized by the 5th Circuit Court of Appeals:

...No longer does one need...  
...DOHSA as a remedy. There is a federal maritime cause of action for death on navigable waters - any navigable waters - and it can be enforced in any court. Law v. Sea Drilling Corp. 523 F.2d 793 (5th 798 Cir. 1975)

Thus, because this new judicially created

general maritime private cause of action is intended to supplement Jones Act and (DOHSA) causes of actions - both of which will permit suit to be brought against the State - this suit against the Highway Department for the wrongful death of Faust is also allowable under Moragne. See also In Re: Holoholo, 512 F.Supp. 899, 902-907 (D.Ha. 1981). But, the Fourth Circuit departed from the law as set forth in Moragne and as established in the cases construing Moragne. In doing so, the Fourth Circuit has decided a crucial issue of Federal Admiralty Law yet to be settled by this Court, and seemingly in conflict with the spirit of Moragne.

The remedies provided by (DOHSA) the Jones Act, and general maritime law would be rendered meaningless with respect to the states if the Eleventh Amendment were to serve as a complete shield behind which the State could hide so as to avoid liability for its own negligence and misdeeds. In

that regard, had the Faust collision occurred while the ferry was in the waterway, and the operator had been killed he could have sued the State under the Jones Act. Or, had the collision occurred outside the territorial limits, (DOHSA) would have provided the mechanism for judicial recovery. In such a situation, it would be wholly contradictory to the well accepted judge-made principles of maritime law to deny Faust a remedy while granting the ferry operator a cause of action as a result of the same injuries sustained from the same accident merely because of geographic coincidence.

D. Applicability of The Rivers and Harbors Act

The petitioners further contend that, regardless of whether there is an implied waiver under Parden or a waiver under Moragne, a private right of action for personal injuries or death caused by the

State's tortious conduct is allowable under §10 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. §403. Various District Courts and Courts of Appeal have so held although there is no uniformity on that question. Compare Riggle v. State of California, supra, ; Red Star Towing and Transp. Company v. Dept. of Transp. of New Jersey, 423 F.2d 104, 105 (3rd Cir. 1970); Chesapeake Bay Bridge and Tunnel District v. Lauritzen, supra.

In the recent case California v. Sierra Club, et al, 451 U.S. 287 (1981), this Court held that there was no private right of action for preserving navigability under §10 of the Rivers and Harbors Act of 1899. This holding was misapplied by the Appeals Court in holding that neither can there be a right of action to remedy tortious injury suffered at the hands of the Highway Department.

As a practical matter, it is undis-

puted that the purpose of the Rivers and Harbors Act is to maintain and promote the safety of navigation and to prevent injuries to private parties as a result of obstructions in navigable waters. Atlantic Refining Company v. Moller, 320 U.S. 462 (1943) (dealing specifically with §15 of the Act). Section 10, has often been interpreted as establishing a standard of care applicable in ordinary negligence actions for damages. See Red Star Towing Co. v. Dept. of Transp. of N.J., supra., at 106 n.4 ; Atlantic Refining Company v. Moller, supra., at 169 n.1, citing The Williams C. Atwater, 110 F.2d 644 (2nd Circuit 1940). Thus, it would seem that a tort action for damages caused by another's negligence, where it is harmonious with Admiralty, is certainly within the purview of the Rivers and Harbors Act §§9, 10, and 15.

It would be a serious misapplication of Cort v. Ash, 422 U.S. 66 (1975) to

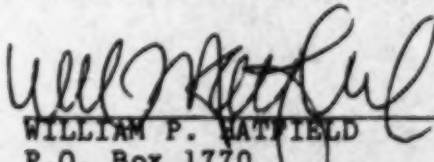
strictly apply its "four factors test" to the case at bar in light of the more recent "implied right of action" cases which limit it and the "four factors" to the status of guidelines in ascertaining legislative intent. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 44 U.S. 11 (1979). This court has recognized that that one type of private remedy may be implied under a statute while another type of remedy may not be. Id.; University's Research Association v.outu, 450 U.S. 754, 769 (1981).

Because the law at the time of the Rivers and Harbors Act would have allowed an action for damages by implying a remedy for personal injuries suffered, a private right of action against the State of South Carolina should also be allowed. Thus, the Highway Department would be accountable under the Rivers and Harbors Act for the petitioners' injuries.

### Conclusion

As demonstrated above, the United States, through the Coast Guard and Corps of Engineers had a duty to responsibly sign, mark, or in the alternative remove the known hazard to navigation and they became liable for the injuries to the Petitioners when they failed to do so. Additionally, the State of South Carolina waives its immunity and is liable for the injuries suffered by Faust, Bennett and Muldrow. For the reasons set forth herein, the petitioners respectfully request that this Court reverse the Order of the Court of Appeals and reinstate the Order of the District Court.

Respectfully submitted,

  
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(803)662-6321

**APPENDIX A**

APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 82-1288

Alean Hester Faust, Administratrix of the  
Estate of Charles Lonnie Faust, deceased,  
Tommy Bennett, Curtis L. Muldrow,

Appellees,

vs.

South Carolina State Highway Department,

Appellant,

and

United States of America,

Defendant.

No. 82-1289

Alean Hester Faust, Administratrix of the  
Estate of Charles Lonnie Faust, deceased,  
Tommy Bennett, Curtis L. Muldrow,

Appellees,

vs.

South Carolina Highway Department,

Defendant.

and

United States of America,

Appellant.

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On Petition for Rehearing

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Submitted: November 14, 1983

Decided: December 13, 1983

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Before WINTER, Chief Judge, WIDENER, Circuit Judge, and Wyzanski,\* Senior District Judge.

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- \* Honorable Charles Edward Wyzanski, Jr., Senior United State District Judge for the District of Massachusetts, sitting by designation
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ORDER AND DISSENT

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Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter with the concurrence of Judge Widener. Judge Wyzanski dissents for the reasons set forth in his supplemental dissenting opinion.

For the Court,

s/William K. Slate

CLERK

WYZANSKI, Senior District Judge, voting in favor of the plaintiffs-appellees' petition for rehearing:

1. The facts in this case are undisputed. The assuredly most comprehensive, and it seems to me the most accurate, version is set forth in my dissent. From that dissent the majority unabashedly draw such portions as seemed to it appropriate for its majority opinion. No part disagrees, at least in print, with the factual summary given in the dissent I have written.

2. So far as concerns the defendants' negligence, this court like the district court has agreed that the plaintiffs have proved their case so far as concerns The Highway Department of South Carolina. The only reason that the majority of this court relieves the Department from liability is the Eleventh Amendment.

3. With respect to the negligence of the United States, the district court and I have no difficulty in holding the United States liable. Apparently both of us agree that the non-statutory principles of admiralty law, akin to principles of tort, make the United States liable. It is one of such principles that the United States, as the government which owns, controls, and exercises paramount power with respect to marine highways on navigable waters, when it expressly or impliedly licenses another to create and maintain in such waters a dangerous structure, and the United States knows of that danger and does less than a prudent, reasonable person would do to remove or alter or prohibit the structure, and such failure causes injury to a third person, the United States is liable for such injury. THE DENIAL OF THAT PRINCIPLE BY THE MAJORITY OPINION HAS RESULTED IN A JUDGMENT WHICH SEEMS TO ME PLAINLY AT ODDS

WITH ELEMENTARY DOCTRINE, AND IF LEFT  
STANDING BOUND TO CREATE MISCHIEF. (The  
statutory theories of the district court  
and their discrediting by the majority of  
this court, I need not consider.)

4. With respect to the issue of the  
liability of the South Carolina's agency, I  
believe that the majority has based its  
judgment on a misunderstanding and  
erroneous application of the Eleventh  
Amendment to the United States Constitution  
and of such interpreting Supreme Court  
opinions as Parden v. Terminal Railway, 377  
U.S. 184 (1964). As explained in my  
dissent, it is my view that:

(a) the majority has misapplied a  
Supreme Court governing precedent,

(b) the majority has failed to  
recognize that the facts of this case  
involve a waiver (of the type recognized by  
the Supreme Court) by the State of South  
Carolina of any immunity otherwise

available to it under the Eleventh Amendment, and

(c) the majority has failed to recognize that when a state accepts from the federal government a license to create a structure upon navigable waters, the state engages in an activity which if it causes injury to another does not fall within the scope of the Eleventh Amendment, (a point expressly made again and again in decisions by the Supreme Court and inferior federal courts, as we ourselves illustrated in Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 [4 Cir. 1968] per Haynsworth, C.J., now called by the majority "not a viable authority and [one which] should not longer be followed".)

**APPENDIX B**

APPENDIX

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 82-1288

Alean Hester Faust, Administratrix  
of the Estate of Charles Lonnie  
Faust, deceased, Tommy Bennett,  
Curtis L. Muldrow,

Appellees,

v.

South Carolina State Highway  
Department,

Appellant,

and

United States of America,

Defendant.

No. 82-1289

Alean Hester Faust, Administratrix  
of the Estate of Charles Lonnie  
Faust, deceased, Tommy Bennett,  
Curtis L. Muldrow,

Appellees,

v.

South Carolina State Highway Department,

Defendant,

and

United States of America,

Appellant.

Appeals from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge.  
78-776-1, 78-778-1, 78-780-1

Argued May 9, 1983  
Decided November 1, 1983

Before WINTER, Chief Judge, WIDENER, Circuit Judge, and WYZANSKI,\* Senior District Judge.

WINTER, Chief Judge:

The decedent of the plaintiff administrat<sup>x</sup> was killed and the two other plaintiffs were injured when, on the night of December 11, 1977, the decedent's motorboat collided with a steel guide cable used by the South

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\* Honorable Charles Edward Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

Carolina State Highway Department  
(Highway Department) in the operation of  
a cable ferry across a canal in the  
Atlantic Intracoastal Waterway.  
Plaintiffs sued the United States and  
Highway Department in admiralty alleging  
that they were joint tortfeasors in the  
operation and maintenance of the ferry.  
The district court gave judgment to the  
administratrix against both defendants  
for \$499,069.00 and to the other  
plaintiffs for \$18,000.00 and \$5,000.00,  
respectively, with prejudgment interest.  
Both defendants appeal.

We reverse. We conclude that there  
was no negligence on the part of the  
United States, and it is entitled to  
judgment as a matter of law. While we  
conclude that there may have been  
negligence on the part of the Highway  
Department, as well as contributory

negligence on the part of the decedent and the other plaintiffs, we think it necessary to reexamine our decision in Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4 Cir. 1968), on which the liability of Highway Department was predicated. We conclude that Lauritzen has been sufficiently undermined by subsequent Supreme Court decisions that it should no longer be followed. As a consequence we conclude that under the Eleventh Amendment Highway Department is not amenable to suit and we reverse the judgment against it.

I.

In the view we take of the case, the facts need not be elaborately stated.

On the night of the tragedy--a Sunday, the decedent, Charles Lonnie Faust, together with plaintiffs, Tommy

Bennett and Curtis L. Muldrow, went fishing in Faust's eighteen-foot open inboard/outboard motor boat in unfamiliar waters, near Georgetown, South Carolina. They launched the boat from a public landing on the Sampit River to which they had been directed and they fished in an area to which they were taken by a professional fisherman who accompanied them after they encountered him on the water in his disabled boat. After fishing for several hours and collecting shellfish, they returned to their guide's disabled boat where he left them. He gave them directions how to return whence they had come, but because they erroneously identified their point of origin, he directed them to a landing in close proximity to one of the landings of the South Island Ferry. In addition to no

familiarity with the waters of the area, they neither had, nor had they consulted, any maps or charts.

The South Island Ferry is a cable operated ferry, operating across a canal of the Intracoastal Waterway. Since 1940, it has employed a separate 5/8 inch steel guide cable. When not in operation, the ferry is moored on the east or island side of the canal and the guide cable is slack and rests on the bottom. When the ferry is in operation the guide cable is raised to four feet above the water's surface.

Prior to December 11, 1977, there had been a number of collisions between boats and the ferry cable.<sup>1</sup> There was an elaborate system of warnings about the hazard of the ferry and the cable. When the ferry is in operation various warning lights and sirens are activated.

Two signs, having flashing red lights and flood lights, were posted on either side 500 feet northeast of the crossing, the direction from which Faust approached, as well as south of the crossing. The crossing is approximately 300 feet wide. The signs variously advise that there is a cable ferry 500 feet ahead, that the cable is above water when the ferry is in operation and that mariners should stop on red. The sides of the ferry, painted with

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1. One such collision was litigated in Doyle v. United States, 441 F. Supp. 701 (D. S.C. 1977). There recovery was sought from both the United States and South Carolina. South Carolina settled the suit, and the district court held the United States liable under 14 U.S.C. Section 86 for failure to mark the cable adequately. Subsequent to that case, some additional warnings were established.

luminous paint in a black and orange striped pattern, also bear signs reading "Cable Ferry - Stop on Red." Some of these warning devices were installed after the litigation in Doyle, see supra note 1, when a district judge voiced sharp criticism of the hazard. Other warning devices recommended by the Corps of Engineers had not yet been established. On December 11, 1977 the United States Corps of Engineers was also pressing for replacement of the ferry and South Carolina was in the process of procuring a self-propelled ferry. After the guide was returned to his disabled boat, Faust entered the Intracoastal Waterway and proceeded down the middle of the channel at a planing speed of 15-25 m.p.h. It was dark; the weather was good; and the tide, against which Faust was proceeding, was rising.

The ferry was in operation, but the Faust boat passed the warning signs without decrease in speed and struck the cable. Faust was killed and his passengers injured. Apparently the speed of the boat drowned out the sirens which were sounding.

## II.

### Liability of the United States

The district court found liability on the part of the United States. Since it was an uncontested fact that the cable ferry operated in navigable waters of the United States, the district court reasoned that the United States was "charged by law with various responsibilities and duties concerning the cable ferry" which the United States failed to carry out. Specifically the district court held that the Coast Guard failed to carry out its duty under 14

U.S.C. Section 81 to mark properly an obstruction in navigable waterways. The district court also held that the Coast Guard breached its duty, imposed by case law, to warn mariners of hidden dangers to navigation. The Corps of Engineers, so the district court ruled, had a duty under 33 U.S.C. Section 401, et seq., to remove obstructions to navigation in the navigable waters which it failed to perform when it took no steps to ensure that Highway Department had supplemented its warning system or removed the cable. Finally, the district court appeared to conclude that the Corps of Engineers had breached its common law duty to remove obstructions or to require that they be properly marked.

We do not doubt that if the United States, through the Coast Guard or the Corps of Engineers, breached some duty

imposed by statute or the common law by failing to mark the cable adequately or to require its removal, plaintiffs would have a meritorious cause of action against it under the Suits in Admiralty Act (SIAA). See 46 U.S.C. Section 742;<sup>2</sup> Lane v. United States, 529 F.2d 175 (4 Cir. 1975) (Coast Guard's failure adequately to mark wreck is actionable under SIAA). The question however, is to determine if the Coast Guard and Army Corps of Engineers' actions or inaction violated some statutory or common law duty. As a source of such a duty, plaintiffs and the district court cite two statutes--14 U.S.C. Section 81 and

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2. The SIAA permits suits in admiralty against the United States "In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained . . . ." That is, it renders the United States liable to suit to the same extent that a private person would be liable. Lane, 529 F.2d at 179.

86,<sup>3</sup> which empower the Coast Guard to establish aids to navigation and mark obstructions, and 33 U.S.C. Section 403, which requires Army authorization of structures placed in navigable waters-- and the common law duty, recognized in Indian Towing Co. v. United States, 350 U.S. 61 (1955), of one who undertakes to warn the public of a danger to do so in a careful manner. We consider these sources seriatim.

A. 14 U.S.C. Section 81, 86

Section 81 states, in pertinent part, that "[i]n order to aid navigation and to prevent disasters, collisions and wrecks of vessels . . . the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation

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3. In Doyle v. United States, *supra* note 1, liability of the United States in a similar accident was predicated upon this provision.

required to serve the needs of . . . the commerce of the United States . . .," while Section 86 states, insofar as pertinent, that "the Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters . . . in such manner and for so long as, in his judgment, the needs of maritime navigation require." It further provides that the Secretary may charge the owner of the obstruction for costs incurred in marking it. Prior to 1965 Section 86 was phrased in mandatory terms, and the Army was charged with marking abandoned wrecks.

We have twice had occasion to rule on the duty imposed on the Coast Guard by these two sections. In Lane v. United States, 529 F.2d 175 (4 Cir. 1975), we held that the United States

could be held liable for damage caused to a pleasure boat by a collision with a poorly marked sunken barge. We concluded that while, after the 1965 amendments, the duty to mark was not mandatory, the section "at least, requires care and prudence to mark submerged wrecks which constitute substantial hazards to navigation." Id. at 179. In Magno v. Corros, 630 F.2d 224 (4 Cir. 1980), on the other hand, we ruled the United States could not be held liable for the Coast Guard's alleged failure adequately to mark a dike. We reasoned there that the duty to mark imposed by that section did not encompass things, such as the dike, which were placed as an aid to navigation and which were authorized by Congress. We concluded that "Section 86 is inapplicable to a structure . . .

which was constructed for a proper governmental purpose." Id. at 228. The cable, of course, is a purposefully constructed and not an accidental obstruction, and thus under our reasoning in Magno the Coast Guard was under no duty to mark it under Section 86. There could therefore be no breach of a duty to mark on the part of the United States.

B. 33 U.S.C. Section 403.

This statute prohibits the construction of any structure in a navigable river "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." In fact a permit for operation of the ferry had been issued on condition that there be certain markings.

We do not think that the United States may be held liable for permitting an obstruction under Section 403. We know of no decision holding the United States liable in tort on the basis of an alleged failure by the Corp of Engineers to fulfill its statutory mandate to regulate obstructions placed in the navigable waterways.<sup>4</sup> The assumption by the government of authority to regulate a particular activity should not render it liable in tort when it fails to exercise that authority to protect an individual from injury.

Zabala Clemente v. United States, 567 F.2d 1140 (1 Cir. 1977), cert. denied,

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4. The United States may be held liable under the Rivers and Harbors Act if it places an obstruction in navigable waterways in violation of its provisions. See, e.g., Norfolk & Western Co. v. United States, 641 F.2d 1201 (8 Cir. 1980); The Snug Harbor, 40 F.2d 27 (4 Cir. 1930).

435 U.S. 1006 (1978). At common law an undertaking to protect a person from harm does not give rise to a duty enforceable in tort unless the undertaking is in satisfaction of an antecedent legal duty, or increases the risk of harm, or the person relies to his detriment upon the undertaking. Restatement of Torts 2d Section 323. Thus, at common law the undertaking by the United States to regulate obstructions in navigable waters does not, standing alone, give rise to a duty to do so enforceable in tort. Moreover, particularly strong reasons exist for not imposing such a duty upon the government, for that would deny to it the power to determine how best to allocate scarce resources to satisfy the wide range of ambitious regulatory programs which the government has

undertaken. Gercey v. United States,  
540 F.2d 536, 538-39 (1 Cir. 1976).

It has authoritatively been held that the exercise of the function to issue permits is an unreviewable discretionary function. In California v. Sierra Club, 451 U.S. 287 (1981), the Supreme Court held that the provisions of the Rivers and Harbors Act, Section 401 et seq., did not provide a private cause of action to challenge the construction of an unpermitted structure in navigable waters. Similarly, several courts have held the grant of a permit thereunder to be an unreviewable discretionary function. See Gemp v. United States, 684 F.2d 404, 408 (6 Cir. 1982) (decision by Corps to post warnings at dam is discretionary); Boston Edison Co. v. Great Lake Dredge & Dock Co., 423 F.2d 891 (1 Cir. 1970)

(decision by Corps to dredge river is discretionary, and so is not actionable under the Tort Claims Act); Lynch v. U.S. Dep't of Army Corps of Engineers, 474 F. Supp. 545, 550, 552 (D. Md. 1978), aff'd without opinion, 601 F.2d 581 (4 Cir. 1979). If the issuance of the permit is unreviewable, we cannot see how the United States can be held liable for having issued a permit to allow a hazardous obstruction to exist, because of necessity such liability would involve a determination either that the permit should not have been issued or, once issued, that it should have been revoked.

We thus conclude that the United States could not be liable in this case under 33 U.S.C. Section 403.

C. Common Law

We are aware of no authority and

counsel has cited none which holds that the United States may be held liable on a common law tort theory of failure to maintain safe conditions on navigable waters which it "owns." Of course, in Indian Towing Co. v. United States, 350 U.S. 61 (1955), the United States was held liable for damage sustained by a vessel which ran aground after a lighthouse light operated by the Coast Guard was negligently allowed to go out. The Supreme Court stated that once the Coast Guard chose to operate the light and engendered reliance on the guidance afforded by it, it was obligated to use due care to ensure the light was kept in operation. Id. at 69. The principle laid down in Indian Towing requires no more than that the government not injure sailors or boaters by inducing reliance on misleading navigational aids. It

imposes no general duty upon the government to ensure navigable waters are safe or to provide warning devices. In Magno v. Carros, 630 F.2d 224, 228 (4 Cir. 1980), for example, we held that the Coast Guard could not be held liable under Indian Towing for failing to provide additional lighting or marking on a dike so long as the light it provided worked properly and did not mislead the boater. Similarly, in Chute v. United States, 610 F.2d 7, 13-15 (1 Cir. 1979), it was held that allegedly inadequate warning devices were not actionable under Indian Towing so long as the devices provided worked properly.

Recognizing this limitation upon the liability of the government at common law, plaintiffs suggest Indian Towing is applicable here because lights placed on the ferry at the government's suggestion

ferry would fool a boater into believing no danger existed. Id. at 1031-32.

This, however, is no basis for finding liability on the part of the United States since it was not directly responsible for the safety devices installed.

In sum we do not perceive any basis for saying that the United States breached or failed to carry out any duty imposed on it by statute or by common law so as to render it liable in this case. Accordingly the judgment against the United States will be reversed.

### III.

#### Liability of South Carolina

The district court found South Carolina liable,<sup>5</sup> but we conclude that the Eleventh Amendment<sup>6</sup> insulates it from a judgment rendered by a federal court. It would not be amiss for us to

distracted them from the cable and thus misled them. When by its remedial measures the government misleads a boater and that causes an accident it is actionable under Indian Towing. We recognized that possibility in dicta in Magno, and at least one court has so held. Donily v. United States, 381 F. Supp. 901 (D. Ore. 1974) (United States liable for misleading weather information provided by Coast Guard). See also De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5 Cir. 1971) (United States would be liable if it negligently furnished misleading charts to navigator). In the instant case, the district court found that the safety devices installed "actually increased the risk caused by the cable ferry," 527 F. Supp. at 1044, presumably because the flashing lights of a landed

explain why we decide this aspect of the case on this ground.

From our examination of the record, we have no doubt that were South Carolina amenable to suit it should be held liable to some extent. It argues that plaintiffs are barred from recovery by their contributory negligence. The district court found that plaintiffs, and especially the decedent, were not guilty of contributory negligence as a result of the consumption of alcoholic beverages and that finding is not

5. The parties concede that Highway Department is an agency of the State of South Carolina and a suit against Highway Department is a suit against the state.

6. The Amendment reads as follows:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

clearly erroneous. But there was other evidence of negligence--operating at excessive speed at night, without lights and without charts, in unknown waters--and we have no doubt that there was some negligence on the part of decedent and perhaps the other plaintiffs. This case, however, is one in admiralty where the doctrine of comparative negligence obtains, and we are unable to agree that negligence on the part of plaintiffs and the decedent was the sole proximate cause of the collision. It is appropriate therefore that we consider an aspect of the case on which we can reach a judgment. In addition, Edelman v. Jordan, 415 U.S. 651, 677-78 (1974), states that an Eleventh Amendment defense is in the nature of a jurisdictional defense that may be raised at any time. Thus by deciding

the case on this ground, we do no violence to the established canon that courts should not reach or decide constitutional issues except where they cannot be decided on non-constitutional grounds.

A state's defense under the Eleventh Amendment can, of course, be waived, and the district court concluded that under our decision in Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4 Cir. 1968), South Carolina had impliedly waived its right to immunity and consented to suit when it undertook to operate a ferry on a navigable body of water subject to federal regulation. We agree that application of the holding in Lauritzen to the facts of this case would result in that conclusion, but the decision in Lauritzen embodied a reading of Parden

v. Terminal R. Co., 377 U.S. 184 (1964), which later Supreme Court decisions have shown is untenable. It follows therefore that Lauritzen is not a viable authority and should no longer be followed.

In Lauritzen, we said, quoting Parden, 377 U.S. at 196, that "when a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation." We applied that language to mean that when Virginia constructed and maintained a bridge-tunnel spanning the Chesapeake Bay at the Virginia capes--clearly navigable waters of the United States--Virginia consented to be sued for

damages sustained from a submerged obstruction in the waters.

The sweep of the language of Parden on which we relied has been sharply curtailed by two later decisions. In Edelman v. Jordan, 415 U.S. 651 (1974), the Eleventh Amendment question which was decided was whether Illinois had waived its Eleventh Amendment immunity and consented to be sued by participating in a federal-state program of aid to the aged, blind and disabled. Reliance for an affirmative answer was placed, inter alia, on Parden. The Court, however, said that a state waives its immunity by entering an area subject to congressional regulation only where the governing statute required such a waiver "'by the most express language or by such overwhelming implications from the text as [will] leave no room for any

other reasonable construction.'" Id. at 673, quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). With respect to Parden, the Court said that its rationale was that it "involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities". Id. at 672.

Even before Edelman was decided, in Employees v. Missouri Public Health Dept., 411 U.S. 279 (1973), the Court held that the Eleventh Amendment barred suit by state employees against the State of Missouri for overtime compensation under the Fair Labor Standards Act, because that Act, although it obligated Missouri to pay minimum wages and overtime, did not

expressly repeal a state's Eleventh  
Admendment immunity. Parden was again  
limited to the fact that the state  
(Alabama) conducted an activity normally  
carried on by private persons and  
corporations and thus brought itself  
squarely within the terms of the statute  
authorizing the proprietor to be sued.

There is no claim in this case that  
there is any federal statute allowing a  
private cause of action against states  
for obstructing navigable waters or  
negligently operating a ferry. South  
Carolina has no state tort claims  
statute. All there is is the fact that  
South Carolina operates a ferry in  
navigable waters. But under Parden, as  
explained by Edelman and Employees, this  
is not an implid waiver of Eleventh  
Amendment immunity and consent to suit,  
notwithstanding Lauritzen to the

contrary. Since we are obliged to follow Edelman and Employees, we must conclude that we should not follow Lauritzen and that there was no waiver of Eleventh Amendment immunity here and the judgment against South Carolina must be set aside. We add only that our conclusion on this point is in accord with every other court of appeals which has considered this issue. See, Karpovs v. Mississippi, 663 F.2d 640 (5 Cir. 1981); Riggle v. California, 577 F.2d 579 (9 Cir. 1978); Williamson Towing Co. v. Illinois, 534 F.2d 758 (7 Cir. 1976). See Also, Red Star Towing & Transp. Co. v. Dept. of Transp., 423 F.2d 104 (3 Cir. 1970). REVERSED.

WYZANSKI, Senior District Judge,  
dissenting:

With the deepest respect for the opinion of my brethren who speak with the special authority of many years' experience as judges in this Circuit applying both federal law and the law, inter alia, of the State of South Carolina, I find myself unable to agree either with the way Chief Judge Winter has summarized the record in this case factually or, what is far more important, with his and Judge Widener's view of the bearing of the Eleventh Amendment of the United States Constitution and the federal admiralty law upon the facts of this case.

Because it seems to me likely that the Supreme Court will grant certiorari in this case, I set forth at unusual

length the factual and legal grounds upon which I am basing my dissent.

I begin with the facts.

The administratrix of the estate of Charles Lonnie Faust, the late owner-operator of a pleasure motorboat (hereafter usually called "the vessel" or "the craft") and Faust's two passengers, Thomas Bennett and Curtis Muldrow, filed in the district court three parallel actions in admiralty, invoking the jurisdiction conferred by 28 U.S.C. Section 1333 and 46 U.S.C. Section 742. (For convenience we shall refer to Faust, Bennett, and Muldrow as "the plaintiffs," when more exactly we might have said "the administratrix's decedent and the two other plaintiffs"). The plaintiffs named as defendants South Carolina Highway Department (sometimes referred to as "the Department") and the

United States. The complaints alleged that both defendants were liable for the death of Faust and injuries to Bennett and Muldrow when Faust's motorboat collided on the night of December 11, 1977 with a 5/8 inch steel guide cable (usually referred to as "the cable" or "the guide cable") lying over or under the surface of a canal in the Atlantic Intracoastal Waterway ("AIW") which admittedly constitutes "navigable waters of the United States." The South Carolina Highway Department, as owner, operated that trans-canal guide cable in conjunction with a canal ferry. The complaints further alleged that the negligence of the Department and of the United States caused Faust's death and Bennett's and Muldrow's injuries.

The district court held that the plaintiffs were free of fault but that

the Department and the United States were equally at fault in causing the death and injuries, and that each of the defendants should pay as damages one half of (a) \$499,069 to Faust's administratrix, (b) \$5,000 to Bennett, and (c) \$18,000 to Muldrow plus, in each of the three cases, interest.

Each defendant appealed to this court on the ground that the district court erred in concluding that the plaintiffs were without fault and that the defendants were at fault. The questions presented are, for the most part, the customary ones when personal injury claims are made in a federal court against a state agency and against the federal government, but this particular case requires us to give an unusually long recital first of the conduct of the plaintiffs before the

accident, and then of the location, operation, and history of the guide cable and of the ferry which it guided. Our recital of those primary facts is for the most part drawn from the district court's specific findings, which are in every important respect supported by substantial evidence. In a few instances we have amplified our account by including other primary facts to be found, virtually without contradiction, in the extensive record of the trial. As to ultimate facts and the conclusions of the law with which they are interwoven, we have not been quite so deferential to the district court, although in the end we come out with the same conclusion as the district court.

We start with the primary facts as to the plaintiffs and then as to the guide cable and the ferry.

On the morning of December 11, 1977 Faust, Bennett, and Muldrow in Faust's 18-foot open, inboard/outboard pleasure motorboat left South Carolina to go fishing in Winyah Bay which abuts the Estherville-Minim Canal ("the canal"), which in turn is part of the AIW and flows along the banks of Georgetown County, South Carolina.

None of the three had ever operated a vessel in salt water, or was familiar with the Winyah Bay area. However, Faust had had experience with small craft in fresh water and had taken a course in navigation safety. None of the plaintiffs had a nautical chart, and no chart was aboard the motorboat.

Shortly after the voyage began, the Faust party, by chance, picked up from his disabled boat Henry H. ("Happy") Hendricks, a commercial fisherman, resident in the Georgetown area, who agreed to accompany the trio to a fishing area known to him. After an afternoon of fishing and oyster-gathering, the party went to a locus where Hendricks had crab pots.

During the day the three plaintiffs had been drinking from a half bottle of Scotch whisky: only Bennett drank at the Georgetown landing, but all three of the original party had drinks at the time they encountered Hendricks; Faust may have had during the day as many as three drinks; Hendricks after joining the party had several drinks; Bennett had three drinks during the day; Muldrow had two drinks of which he spilled one; but

South Island side of the waterway had, in addition, (1) two sirens on the top of the middle sign which were activated when the ferry was making a crossing, and (2) a red strobe light, also turned on during a crossing, near the sirens on the middle sign.

The ferry itself had mounted on it five revolving red lights similar to those used on police and fire vehicles, and a red strobe light atop its 16-foot mast--all of which operated when the ferry was making a crossing. The ferry was equipped also with a battery-operated siren, but this siren had to be activated manually by the operator from inside his cabin, and so could not be turned on when the ferry was docked at the mainland side. In addition, the ferry had on it stripes in orange and

white fluorescent paint and a sign reading "Cable Ferry Stop on Red."

The steel guide cable itself was marked by only two standard-size Highway Department stop signs, mounted in a wooden frame. The signs, attached to the guide cable just behind the ferry, are called "trailing stop signs" because they rose above the water's surface along with the cable when the ferry's engine was on. The stop signs were not lighted in any manner whatsoever, and were not visible in the dark.

The ferry landing areas on both sides of the waterway were lighted at night with mercury vapor street lights like those on city streets. Those lamps, the lights on the ferry, and the lights on the advance warning signs were visible to a vessel's crew from the time

it seems that no one had a drink after the party left the fishing area. Thus, by process of elimination, it seems that Faust, the motorboat's sole mariner, could have drunk at most a couple of ounces of a bottle of whisky which at the start was only half size.

As darkness approached, the four headed back to where Hendricks had joined the party. There Faust's vessel towed Hendricks' boat to Campbell's Landing. When they left Hendricks there, they asked him for directions to the "boat landing." Mistakenly, Hendricks supposed the trio sought directions to the South Island ferry and directed them accordingly. Following those misconceived directions, Faust at about 6:10 p.m. headed his craft from Winyah Bay into the Estherville-Minim Canal.

At this point in our account we, during the next thirty or so paragraphs, describe the ferry and the steel guide cable which had impact on Faust's vessel and also the warning system set up by the South Carolina Highway Department in connection therewith. This interruption in the narrative of the events of December 11, 1977 will later be justified by our recital of the primary facts as to what those on the Faust vessel might have observed and actually did observe on the night of the accident.

Across the canal at mile 411.5 the South Carolina State Highway Department had for 30 years operated and was still operating a cable ferry to provide trans-canal transportation between the Georgetown County mainland and South Island lying to the east. When at rest

the ferry was berthed at South Island. In operation the ferry was propelled by a cable propulsion system and guided and stabilized by a 5/8 inch steel cable affixed permanently to each side of the canal. (It is this steel guide cable which is of critical significance.) The operator of the ferry controlled its engine (which itself was located on land) by a manual throttle which was placed inside the ferry's cabin and was operable only from inside the cabin. When the ferry operator activated the engine the activation, even if the ferry was not yet on her voyage, caused the steel guide cable (which when the engine was idle lay below the surface of the water) to become taut and to rise to 4 feet above the water all the way across the width of the canal, thus blocking passage on the canal. From constant

usage, the cable by 1977 had become a muddy brown color and was invisible at night.<sup>1</sup>

On December 11, 1977 there were, inter alia, the following warnings with respect to the guide cable.

There were four sets of signs with lights attached, referred to as "advance warning signs," intended to attract a vessel's attention before it reached the ferry and cable. One pole stood at each of four locations: (1) on the mainland side, 500 feet south of the ferry; (2) on the island side, 500 feet south of the ferry; (3) on the mainland side, 500

1. Norman Sturkie, employee of the Department of Highways and Public Transportation, testified at Tr. Vol. I, p. 173 as follows:

"When a person approached this cable that you have described for us, was it visable at night, sir?"

"No, sir."

feet north of the ferry; and (4) on the island side, 500 feet north of the ferry. Affixed to each pole were three separate signs arranged vertically.

The sign on top was approximately 3-foot by 4-foot in size. It read as follows:

5  
M.P.H.  
By Order of  
U.S.C.G. - COTP  
33 CFR - 160

The legend consisted of white letters on a red background. The "5" was printed in 12-inch letters, and the "M.P.H." in 4-inch letters.

Under this sign was a 5-foot by 12-foot sign which read:

CAUTION  
CABLE OPERATED FERRY  
500 - FEET AHEAD  
STOP ON RED

The word "Caution" was printed in 12-inch black letters on a red

background. The portion of the sign stating "Cable operated Ferry - 500 Feet Ahead" was in 12-inch black letters on a white background. The "Stop on Red" message appeared in 9-inch black letters on a red background.

The bottom sign, 2-foot by 9-foot in size, bore the message:

CABLE ABOVE WATER WHEN FERRY  
IN OPERATION

This legend was printed in 8-inch black letters on a white background.

Each set of signs at the four locations was placed in a position perpendicular to the waterway. Each was lighted by two spotlights which operated continuously after dark. Each had two red-flashing "wig-way" lights which operated when the ferry was making a crossing. Each set of signs on the

the vessel entered the Estherville-Minim Canal from Winyah Bay.

In addition to the signs, lights, and markings placed at the site of the South Island ferry by the Highway Department, notice of the ferry cable was afforded mariners in various issues of the Local Notice to Mariners ("Local Notice"), published by and available from the regional office of the United States Coast Guard, supplementing the Coast Guard's nautical charts and the National Ocean Survey's publication Coast Pilot. Although the editions of the nautical charts depicting the Esterville-Minim Canal available in 1974 contained only the notation, "Cable Ferry," and the March 26, 1977 edition of at least one relevant chart (Chart No. 11534) apparently said nothing more, the additions to the charts contained in

Local Notice (to which we next turn) did describe more specifically the cable.

The June 8, 1977 Local Notice warned mariners as follows: "The South Island Ferry's cable is dropped to the bottom only when the ferry is moored to the east side. Warning signs north and south of the ferry crossing are topped with red lights which flash when the ferry is in operation. There are also flashing red lights on the ferry itself."

The August 10, 1977 Local Notice revised that message to read as follows: "The cable is suspended during crossings and dropped to the bottom only when the ferry is moored to the island (east) side. Warning signs north and south of the ferry are equipped with red lights which flash when the ferry is in operation. In addition, flashing red

lights are on the ferry itself. DO NOT ATTEMPT TO PASS A MOVING CABLE FERRY."

Moreover, the November 2, 1977 Local Notice contained the following additional statement: "In accordance with Title 33 Code of Federal Regulations, Part 160.35(B), Captain of the Port, Charleston, South Carolina orders that until further notice Intracoastal Waterway traffic shall observe a speed limit of five MPH between signs marking the South Island cable ferry crossing at mile 411.5 on the Intracoastal Waterway. The signs are placed one-quarter mile on either side of the crossing."

We now return to our narrative of Faust's December 11, 1977 voyage.

With Faust at the wheel, and his head above the level of the windshield, his vessel proceeded at a speed of 15 to

25 miles per hour down the middle of the canal. Bennett stood in the passenger area with his face looking forward and his head above the level of the windshield. Muldrow, looking aft, sat in a passenger seat behind Faust.

The tide was rising; the night was dark, clear and cold. The boat travelled the canal toward the ferry's 5/8 inch steel guide cable which was taut and spanning the canal approximately 4 feet above the water. The cable was fastened to the ferry, from which on that night its operator was intermittently discharging its cargo of cars on the mainland, side of the canal. The ferry's lights were lit. The ferry's siren, though in an operative condition, was not being continuously sounded, as the ferry operator from time to time while

discharging cargo temporarily left the cabin where the siren was controlled. Even if the siren had been operating, it could not have been heard above the roar of the engine of the Faust vessel by those on that vessel.

As the Faust vessel proceeded down the canal, and as it passed the warning signs, we do not know what the no-longer living Faust saw or heard; Bennett saw only a "blur"--"something shining" to his left--and he heard the siren only as the vessel struck the cable. Muldrow did not see the signs; but, like Bennett, heard the siren at the moment of impact.

As it approached the cable, the vessel did not slow down nor alter its course.

The vessel's bow passed under the cable, and the vessel's windshield

struck the cable. The impact hurled Faust to the bottom of the boat and, injuring his neck and head, virtually instantly killed him. The impact threw Bennett from the vessel into the water; it tossed Muldrow inside the boat and rendered him unconscious.

Next, we consider the previous history of the steel guide cable and its predecessors, if any.

Between 1955 and 1975 the ferry and its cable had been involved in approximately 40 accidents, in most of which pleasure boats collided with the cable. Of those 40 accidents, the South Carolina Department of Marine and Wildlife Resources investigated 7 and made reports thereon to the United States Coast Guard. The Coast Guard investigated 2 of those 7 reported

accidents and also 3 additional accidents.

Among the 1955-75 accidents the most significant for present purposes was that in which one Fulton was killed in 1974 when his vessel struck the same cable, or a cable similar to the one which in 1977 caused the death of Faust and the injuries to Bennett and Muldrow.

When the Fulton accident occurred in October 1974 the warning system was somewhat less elaborate than when the Faust accident occurred: for example, then the siren was operative only before the ferry began a canal crossing from the island side; not all the warning signs were illuminated; and relevant nautical charts available in 1974 did not disclose as did the 1977 charts that a cable ferry crosses the Intracoastal Waterway at mile 411.5.

Concerning the Fulton accident, United States Coast Guard Commander Stewart, the officer in charge of Marine Inspection for the zone of South Carolina on November 20, 1974, informed his superior, also a commander, of the hazard of the cable, and indicated that approaching vessels, despite the warning signs, might not see the cable, but only the ferry. Stewart reported to his superior that he had consulted on November 18, 1974 with officials of the South Carolina Highway Department, and that that agency was taking the following steps to improve the situation: (1) installing a switch to allow the ferry operator to lower the guide cable when the ferry was moored to the mainland side; (2) installing on the ferry a siren to be accessible to the operator at all times; (3) putting up

four additional signs to indicate more clearly the danger from the cable; (4) looking into alternative means of providing access to and from South Island, including a bridge or self-propelled ferry; and (5) cooperating with the Coast Guard to conduct a training program leading to the issuance of licenses for the ferry operators. Stewart advised his Commander that "it is not in the best interest of the Coast Guard for this (ferry) to become a Coast-Guard vessel." He closed his letter by saying that "(c)ompletion of the previously mentioned improvements should result in as safe an operation as is possible with a cable ferry," though his "recommendations to the State Highway Department (would) contain a statement to the effect that the only permanent

means of removing the hazard from the cable-type operation is to remove the cables themselves." (Emphasis added).

On November 21, 1974, Stewart wrote to the Highway Department's District Engineer, Mr. Catoe, who was responsible for all maintenance, construction, and engineering activities in the area, "to provide (Catoe) with recommendations intended to assist . . . in safety improvements at the South Island Ferry." He informed Catoe that "the only permanent means of removing this hazard is to remove the cables themselves." Stewart suggested that, until that could be done, the State should make the changes he had described in his November 20 letter to the Commander. In addition, Stewart recommended: (1) that the four additional signs proposed be placed at least another 500 feet north

and south of the present signs (for a total distance of 1000 feet away from the ferry cable), in order to allow vessels sufficient space in which to maneuver, and (2) that the guide cable itself be installed on a lower position on the ferry, so that the risk of injury to persons as opposed to vessels would be diminished.

On November 21, 1974, Catoe, in a memorandum to Mr. Cobb, the State Highway Engineer of the Highway Department, indicated that the following changes, approved by Commander Stewart, were to be implemented at the ferry site: (1) installation of new advance warning signs, to be illumined by 12-inch wig-wag warning lights; (2) painting on the ferry of stripes in orange and white fluorescent paint; (3) mounting on the ferry of one 3-foot by

16-foot warning sign on each side of the vessel; (4) installation of a red strobe light on the mast of the ferry; (5) installation of one red strobe light on each side of the waterway, to operate only when the ferry was in operation; and (6) installation of a switch, to allow the guide cable to be lowered by the operator from the mainland side of the canal. Catoe requested the State Highway Engineer's permission to make these changes, at an estimated cost of \$3,500. Catoe's memorandum contained a postscript enclosing the additional recommendations made in the November 21 letter from Stewart to Catoe.

On December 5, 1974, Cobb replied to Catoe, approving the changes proposed in Catoe's November 21 memorandum and further directing Catoe to comply with the terms of Stewart's November 20

letter and to give consideration to the changes suggested in Stewart's November 21 letter.

Between October, 1974 and October, 1975, the Highway Department made some of the improvements recommended by Stewart and approved by Cobb, as well as certain other changes. The plan to install a switch to permit the lowering of the cable from the mainland side was never implemented. Nor was the guide cable ever placed at a lower position on the ferry. The additional signs warning specifically of the hazard of the cable were not erected. Stewart did not follow up to see if the recommendations made by him had been carried out by the Highway Department.

On October 9, 1975, Fulton's estate and Feaga individually filed suit against the United States and the South

Carolina State Highway Department for damages occasioned by the wrongful death of Fulton and the injuries sustained by his companion Feaga.

Between November, 1975 and April, 1977, the Highway Department, inter alia, installed back-up sirens on the advance warning signs north and south of the ferry, erected a warning sign at the public boat landing adjacent to the ferry site, placed on the ferry itself the 3-foot by 16-foot warning sign consisting of orange and white stripes, and installed on the cable trailing stop signs.

On April 1, 1977, United States District Judge Blatt, after concluding the trial on March 28-31, 1977 of the case arising out of Fulton's death, Doyle v. United States, 441 F. Supp. 701

(D.S.C. Nove. 23, 1977), wrote to Cobb a letter in which he stated in part:

Despite the number of accidents prior to the fatal accident (involving Fulton) and the warnings and letters written since October, 1974, very little has been done to remedy the situation (existing at the South Island ferry). Not only did testimony reveal what I think is the most dangerous hazard to navigation that can be imagined, but at the request of counsel for both sides, I visited the scene, and in my opinion, the situation was even more dangerous than I had anticipated . . . I am thoroughly convinced that someone else will be killed or badly injured unless you do review your files on this crossing and install a safer method than is now used.

On April 6, 1977, the Commander of the Seventh Coast Guard District in Miami, Florida wrote to the successor of Commander Stewart, as Officer in Charge of Marine Inspection for the South Carolina zone, to advise him that during

the trial of the Doyle case, it had come to light that (1) "the condition set up in one of the letters from Commander Stewart, for additional signs approximately 1000 feet up and down the waterway from the ferry cable, has not been complied with"; (2) the ferry was carrying more passengers than permitted by law; (3) the duties required of the ferry operator prevented him from keeping a proper lookout; and (4) the "ferry appears to operate with an absolute minimum of supervision, by anyone who is concerned with, or has knowledge of, maritime law and regulations."

On April 7, 1977, Cobb wrote a reply to Judge Blatt's April 1, 1977 letter. Cobb stated that he felt that all feasible safety suggestions from the Coast Guard had been implemented. He

stated further that the Highway Department was discussing with the South Carolina Attorney General four alternatives:

1. Continue operation of the present ferry, with the resulting liability that may be involved,
2. Change the present ferry operations to a self-propelled type which would involve a substantial expenditure,
3. Construct a bridge structure to the Island for which the Department has no program for funding, or
4. Discontinue the ferry operation.

On May 16, 1977, Captain Mitchell of the Coast Guard's Office of Marine Safety in Charleston, South Carolina wrote to Catoe telling him (1) to advise the ferry operators that carrying more than 6 passengers on the ferry would subject the State of South Carolina and the operator to a \$1,000 penalty for

each violation, (2) to advise the ferry operators to maintain a proper lookout, and (3) that if the ferry operators were given a 3-cell flashlight they could warn approaching vessels of the cable at night by shining the light on the cable and the stop signs attached to it.

The ferry operators were never equipped with the 3-cell flashlight referred to above.

On August 17, 1977, the United States Army Corps of Engineers concluded that it had responsibilities concerning the operation of the South Island ferry. On that date Colonel Rees, the Acting Division Engineer of the South Atlantic Division of the Army Corps of Engineers in Atlanta, Georgia, wrote to Colonel Brown, the District Engineer of the Corps in Charleston, South Carolina, stating that:

1. The South Island ferry . .  
. is not a bridge and such the  
ferry and the cables . . . are  
not subject to regulation under  
the 1973 Memorandum of  
Agreement between the US Coast  
Guard and the Chief of  
Engineers.

2. Ferry cables are subject  
to regulation by the Corps. . .  
under Section 10 of the 1899  
Rivers and Harbors Act. This  
finding is substantiated by the  
reference to requirements for  
ferry cables on page 4,  
paragraph 11, of EP 1145-2-1  
dated October 1974 (Gray Book)  
and 33 CFR 322.5(1)(3) printed  
19 July 1977 in the Federal  
Register.

3. Inasmuch as the cables  
have been found by a Federal  
District Court to be dangerous  
and a hazard to navigation, the  
District should coordinate with  
the State and the Coast Guard  
to determine if additional  
warnings and/or posting is  
warranted and to seek voluntary  
removal of the cables. In the  
event that you are unsuccessful  
in voluntary removal, the  
District should take  
appropriate legal action  
concerning a 403 structure . .  
. (Emphasis added.)

On September 8, 1977, Brown wrote to  
the successor of Cobb as State Highway

Engineer, Mr. Coffey, and requested a meeting with officials of the Highway Department, "to formulate a course of action to abate any existing or foreseen hazard to navigation which (the South Island ferry) may pose." Brown stated in the letter that "the Corps of Engineers is the federal agency primarily responsible for this type of activity, and as such, it has the lawful authority to permit and/or regulate its continued operation."

At a meeting held on October 14, 1977, between representatives of the Corps, the Coast Guard, the Highway Department, and the Wildlife and Marine Resources Department, the Coast Guard Commander stated that he had viewed the warning system at the ferry location and that it was adequate. A representative of the Corps, however, stated that the

present operation of the ferry was hazardous and that it was only a matter of time before the Corps would have to close it down.

On October 23, 1977, there was an accident involving the South Island ferry cable in which three persons were injured.

On October 28, 1977, Brown, prompted by that recent accident, sent a telegram to Coffey in which he (1) requested a meeting on November 3, 1977 "to develop specific plans to remedy the South Island Ferry situation," and (2) directed the Highway Department, "pursuant to authority vested in the District Engineer by regulations promulgated under the Rivers and Harbors Act of 1899," to "minimize the operation of the ferry by restricting its use to the compelling needs of the South Island

residents and those County, State and Federal Government personnel whose presence on the Island is necessary to the performance of their official duties."

On November 3, 1977 there occurred the requested meeting of the representatives of the Corps, the Coast Guard, and the Highway Department, as well as other interested parties.

On November 8, 1977, Coffey wrote to Brown, informing him that a schedule had been devised under which the ferry would operate on the hour, twenty-four hours a day, and that this schedule would reduce the number of ferry crossings from 30 to 24 per day. Coffey also stated that (1) a back-up siren would be installed on each side of the ferry, (2) the orange and white stripes on the side of the ferry had been repainted, and (3) speed

limit signs reducing the speed of boats in the canal to 5 miles per hour had been erected on each side of the ferry crossing.

On November 17, 1977, Coffey wrote to Brown advising him that the ferry would be operated every hour on the half-hour, instead of on the hour as proposed in the November 8 letter, and seeking the Corps' approval for this schedule.

On November 18, 1977, United States District Judge Blatt, in the Doyle case, supra, 441 F. Supp. at 701, found that the injuries to the Doyle plaintiffs were caused by the negligence and abuse of discretion of the Corps and the Coast Guard in failing adequately to warn vessels of danger of the ferry cable and in failing to take steps to improve the safety of the situation.

On November 22, 1977, Brown wrote to Coffey, in response to Coffey's November 8 and 17 letters, that the proposed schedule for operation of the ferry would result in only a 25% reduction in the number of crossings and was therefore unacceptable to the Corps. Brown directed the Highway Department to: (1) have in effect by December 2, 1977 a plan for further reduction of the number of crossings, by scheduling "minimal operation of the ferry to serve the needs of the South Island residents only"; (2) alter the wording of the "existing signs . . . to stress the fact that there is a cable across and above the water surface when the ferry is in operation, and (3) submit, as agreed in the November 3 meeting, by December 2, 1977, "plans for a permanent solution which will result in complete removal of

the cable associated with the South Island ferry."

By a letter dated November 30, 1977, Coffey sent to Brown a revised schedule for operation of the ferry allegedly "based on the actual needs of the island residents." (Emphasis in original.) In this letter Coffey also advised Brown that the Highway Department was "proceeding with the alterations to the existing warning signs to state in positive terms that 'There is a cable across and above the water surface when the ferry is in operation.'"

On December 1, 1977, Coffey advised Brown that the Highway Department would post flagmen in boats upstream and downstream of the ferry, equipping those boats with flashing lights and electronic public address systems to be used to warn traffic of the hazard posed

by the cable. Coffey stated his hope that the Corps would approve the State's proposal--consisting of the revised schedule, the alteration of the warning signs, and the stationing of the flagmen--to allow it to continue operating the ferry.

By separate letter of December 1, 1977, Coffey wrote to Brown confirming the Corps' extension of the deadline, from December 2 to December 5, 1977, for the Highway Department to submit plans for a permanent solution to the ferry cable problem. Coffey further stated that the Highway Department, with the assistance of the Wildlife and Marine Resources Department, contemplated taking prompt action to obtain funding for a permanent solution.

On December 6, 1977, the Highway Department installed the four bottom

signs reading CABLE ABOVE WATER WHEN FERRY IN OPERATION which existed on the night of the Faust accident, as earlier stated.

On December 9, 1977, Brown wrote to Coffey that the Highway Department's plans to implement the revised schedule, add warnings to the existing signs, and post flagmen in the canal "were satisfactory and in compliance with (Brown's) latest instructions." Brown reiterated "(the Corps') serious concern over the (ferry cable hazard) and (urged) that (the Highway Department) secure an early removal of (the) cable." Brown neither set time limits, nor took actions to verify, the State's completion of these goals.

On December 11, 1977 there occurred the collision involving the Faust boat which is the subject of the case at bar.

On December 12, 1977 the Highway Department authorized its District Engineer to hire flagmen to operate the advance warning flag boats proposed by Coffey to Brown in the December 1 letter.

After December 11, 1977, Highway Department officials began corresponding with representatives of an engineering firm regarding the design of a self-propelled ferry. Brown and Coffey continued to correspond about the ferry. Specifications for the new self-propelled ferry were completed in January 1978 and a contract was let for the construction of the ferry in February 1978.

In the meantime, on January 26, 1978, Brown wrote to Mr. Cobb, by then the Chief Commissioner of the Highway Department, a letter stating:

In accordance with . . .  
33 CFR 322.4(a), I have  
determined that the South  
Island ferry is a permitted  
structure since the cable was  
installed prior to 18 December  
1968 and there was no evidence  
available to the Corps to  
indicate it posed a hazard to  
navigation before the recent  
accidents.

Based upon the evidence  
presented and the recent  
findings by a Federal District  
Court Judge, I have determined  
that continued operation of the  
cable ferry constitutes a  
hazard to navigation in the  
area. In accordance with 33  
CFR 325.7 . . ., I have  
reevaluated the circumstances  
and conditions of the South  
Island ferry permit and have  
determined that suspension of  
the permit is in the public  
interest. . .

In the interim I consider  
that continued modified  
operations currently in effect  
may continue until 3 March  
1978. At that time total  
suspension of the operation of  
the cable ferry must occur  
unless you receive approval for  
operation from this office.

The March 3, 1978 deadline referred  
to in the above letter was later

extended to April 29, 1978.

On April 29, 1978 the self-propelled ferry was put into operation at a cost of approximately \$100,000. The total cost of the new ferry was paid for by the Highway Department out of funds that were on hand before December 11, 1977.

In its opinion, Faust v. South Carolina Highway Department, 527 F. Supp. 1021 (D.S.C. 1981), the district court followed a path of reasoning which, although it included reference to principles of the common law of torts, also offered as an alternate basis for its conclusion certain federal statutes to which I need not refer.

Unlike my brethren, I agree with the district court's judgment that on the facts of this case each of the defendants is liable to each of the plaintiffs upon the basis of the

companions who were fellow travellers. Such negligence was the only proximate cause of the death of Faust and of the injuries sustained by Bennett and Muldrow.

Hence, I contrary to the majority of this court, am of opinion that, quite apart from the issue of causation, there was as a matter of fact no contributory negligence on the part of Faust or Bennett or Muldrow. But I do not stop with that statement about lack of causation. I stress that the district court found as a fact that the defendant Highway Department and the defendant United States did not bear the burden, which rested upon them, of showing that Faust, Bennett, or Muldrow was intoxicated. That finding is fully supported by the evidence: a half bottle of whisky, split among three or

companions who were fellow travellers. Such negligence was the only proximate cause of the death of Faust and of the injuries sustained by Bennett and Muldrow.

Hence, I contrary to the majority of this court, am of opinion that, quite apart from the issue of causation, there was as a matter of fact no contributory negligence on the part of Faust or Bennett or Muldrow. But I do not stop with that statement about lack of causation. I stress that the district court found as a fact that the defendant Highway Department and the defendant United States did not bear the burden, which rested upon them, of showing that Faust, Bennett, or Muldrow was intoxicated. That finding is fully supported by the evidence: a half bottle of whisky, split among three or

maybe four persons, consumed by drinking over a span of several hours in one afternoon does not indicate that any of the imbibers was intoxicated at or after 6:15 p.m. on December 11, 1977. The district court also, in effect, found that neither defendant bore the burden of showing that Faust or his companions were contributorily negligent in not possessing on board and examining, or examining without possessing, nautical charts or other available published data before they set off on their recreational fishing trip in the canal. The district court was fully supported by the ratio decidendi in Lane v. United States, 529 F.2d 175, 180 (4th Cir. 1975). And in any event, the district court, independently of our own earlier guidance, was warranted in concluding that the plaintiff's lack of familiarity

with charts and the like did not constitute contributory negligence, especially since the defendants did not prove that those documents showed that the cable was invisible at night.

What is even more important is that were we to hold that Faust and his companions were at fault in having drunk whisky early in the day, or were at fault in not having read the available charts, or were at fault in proceeding at an unreasonably fast rate of speed, there would not be the slightest evidence to sustain the defendants' burden of proving that had there been no such fault the accident would not have occurred. The defendants have not shown that had Faust and his fellow travellers been attentive they would have seen, or have been warned to take heed of, an INVISIBLE CABLE. The majority have

invented a causation of which there is no evidence in the record and which is repugnant to the findings of the district judge.

I now come to what seems to me the Achilles heel in the majority's opinion -- the holding that South Carolina Highway Department is immunized from suit in the federal court by the Eleventh Amendment which provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

It is quite plain that the text of the Eleventh Amendment when read literally does not apply to this or any other suit in admiralty (as distinguished from a "suit in law or equity"), and does not apply to any type

of action brought against a state by citizens of that state -- such as this suit by Faust against his own state of South Carolina (as distinguished from a suit "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). However, more than half a century ago Ex Parte in the Matter of State of New York, No. 1, 256 U.S. 490, 497-500 (1921) conclusively settled that "the immunity of a State from suit in personam in the admiralty brought by a private person without its consent, is clear." Id. at 500.

Thus the issue here is whether by its erecting a ferry cable as a structure over and in navigable waters, admittedly within the federal jurisdiction, the State of South Carolina impliedly waived its immunity

from suit in the federal court for damages caused by the negligent operation of that cable while lying in navigable waters.

This question would be answered affirmatively were this court to adhere to the doctrine of Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968). But the majority of this panel are prepared to overrule that case, out of deference to cited opinions both of the Supreme Court and of inferior federal courts. In my opinion, the cited Supreme Court cases are not governing, and the cited inferior court opinions are either not sound or not applicable to this case.

I do not propose to subject to microscopic examination the cases cited by the majority, for I find a most helpful analysis of the relevant Supreme

Court rulings has already been made by Lawrence H. Tribe, American Constitutional Law, 130-143 (1978) -- pages which are set forth in an appendix to this opinion, inasmuch as probably they would regrettably be otherwise not readily available to the judges and bar of the Fourth Circuit and perhaps other circuits.

Stimulated by Professor Tribe's analyses, I first note that there is, so far as I am aware, no act of Congress which has explicitly provided that a person injured on navigable waters by another's negligent act in those waters shall have a cause of action in admiralty or otherwise. But such a person (or his representative if he has been killed by the other's negligent act) is nonetheless entitled to bring an action under federal maritime law

against the wrongdoer, if he or it is a private person. Moragne v. States Marine Line Inc., 398 U.S. 375 (1970).

Moragne stands for the proposition that there is a common -- in the sense of non-statutory -- law of federal origin, created by the federal judiciary, which applies to injuries in navigable waters.

Were there an act of Congress which provided for the present action, then under the teaching of Parden v. Terminal Railway of the Alabama State Docks Dept., 377 U.S. 184 (1964) -- a case whose vitality was recognized last year in United Transportation Union v. Long Island Rail Road Co., 455 U.S. 678, 685 (1982) -- it is indubitable that the state of South Carolina in connection with the operation of a ferry cable over and in navigable waters would, despite

general constitutional provisions inferentially including the Eleventh Amendment, have been subject to the jurisdiction of the United States courts in an action brought by a person who suffered damages through an injury caused by the states's or the state's agent's negligence. Operation of a ferry like "operation of a railroad engaged in interstate commerce is not an intergral part of traditional state activities generally immune from federal regulation." United Transportations Union v. Long Island Rail Road Co., supra. Nor, by parallel reasoning, is it immunized, by the text of the Eleventh Amendment, from suit in the courts of the United States.

The majority opinion's failure to recognize the continued vitality of Parden is contra-canonical as the parts

of Professor Tribe's book set forth in the appendix to this opinion demonstrate.

Of course, this case at bar is unlike Parden or United Transportation Union because here there is not a Congressional statute which explicitly provides for liability to persons injured by negligent acts performed on navigable waters. But the policy considerations which underlay Moragne v. States Marine Line's Inc. dictate a conclusion that the absence of a statute is not a fatal flaw in the plaintiffs' case at bar. To be sure, where Congress has passed a relevant statute, there is a clear basis for saying that it is reasonable to suppose that state interests will have been adequately considered while the legislation was being adopted. But specific legislation

is unnecessary on personal injuries. The whole trend of twentieth century legislation and other governmental activity would convince any objective observer that the American people by enactments of many types and manifestations of popular will intend to subject state and federal governments to liability for damages for personal injuries which such governments have negligently caused individuals. It would be a work of supererogation to recite the long list of indicia of that attitude. Cf. Moragne, supra.

Were the matter of liability of the Highway Department of South Carolina to suit in the federal courts on a personal injury claim of a person injured by the state's negligence on navigable waters doubtful, there would be a compelling reason on the facts of this case to

navigable waters are governed by the principle that a person who creates a structure or other artificial condition on land, or on water over land, whether the land be his own or another's, which he realizes or should realize will involve an unreasonable risk of physical harm to another is subject to liability to that other for such physical harm. Restatement (Second) Torts Section 364.

In the case at bar, on water over land, the Highway Department created a ferry cable which was (according to the evidence apparently believed by the district court) invisible at night, 527 F. Supp. 1030, lines 9-10, by travellers proceeding at either a reasonable or unreasonable rate of speed on the channel. The Department's conduct, in creating such a cable was, as a matter of law, negligent toward Faust and his

sustain the state's liability here. This is not a case in which the plaintiffs were injured by a vessel owned by the state and licensed by the federal government to sail in navigable waters controlled by the federal government. Cf. Frankfurter, J. dissenting in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 288 (1959) lines 12-16. Here we are concerned with an injury inflicted by a structure on the navigable waters. Were these only a vessel involved, no one could suppose that the United States would itself become liable to a third person for an injury caused by the state's operation of the vessel. But it is otherwise with a structure placed by the state on navigable waters. If this structure be placed there with the consent, express or

implied, or even the knowledge and acquiescence, of the United States, it is at least arguable (in fact, as I shall later demonstrate it is more than arguable) that the United States would be liable to third persons who are injured by the negligent construction, operation, or maintenance of the structure. Hence it is only reasonable for a court to infer that when the United States permitted the state to erect and maintain such a structure both the United States and the state contemplated an implied waiver by the state of its immunity under the Eleventh Amendment to suits brought by third persons based on negligent state construction, operation, or maintenance of the structure (i.e., the cable).

In short, I am of opinion that in the case at bar the Highway Department

impliedly waived its Eleventh Amendment immunity.

I also disagree with the conclusion of the majority that the United States is not liable to the plaintiffs -- and it seems to me that on this as on the preceding point this court has fallen into such fundamental and potentially mischievous error likely to mislead later courts as to furnish strong support for a petition by the plaintiffs for a writ of certiorari from the Supreme Court of the United States.

I can see no plausible ground for not applying, by analogy, to the United States the familiar principle that "the duty of maintaining a highway (on land or sea) in a condition safe for travel is . . . placed upon the municipal subdivision (or other public body) which holds the highway open to the public for

travel." Restatement (Second) Torts Section 349, comment b. In the case at bar it was the duty of the United States to travellers on its channel to maintain in free of an INVISIBLE ferry cable or alternatively in the clearest terms to warn travellers of this hidden and hardly to be anticipated hazard, the nature and danger of which were fully known to the responsible officers of the United States.

The argument that neither the Highway Department nor the United States should have been expected to take immediate action to make by phosphorescence or other means the cable wholly visible at night and to warn in the most explicit terms of the danger to life from the hidden cable is an argument that seems to prefer money to lives. So far as appears, it did not

take a legislative act of South Carolina to buy phosphorescent paint and to post visible notices with explicit warnings. Any decent regard for the concern expressed by District Judge Blatt in his direct communication to the responsible federal officials, written after that judge sat in an earlier case parallel to the present case, probably would have saved Faust's life. I would affirm the district court's judgment awarding compensation to Faust's administratrix and his companions.

To sum up the matter:

1. On the issue of the alleged negligence of the defendant Highway Department of South Carolina, I agree with my brethren that the Department was negligent in continuing to maintain, as of December 11, 1977, a cable which was invisible at night.

2. On the issue of the alleged contributory negligence of Faust and his companions, I dissent from my brethren's opinion (a) that those plaintiffs were contributorily negligent and (b) that their supposed negligence was a cause of their injuries. But I do not suggest that, if it stood alone, this point would merit review by this court en banc or by the Supreme Court. However, if other points do merit such review, then it might be thought that this point would properly deserve further consideration.

3. Unlike my brethren, I do not regard the Eleventh Amendment as a barrier to the plaintiffs' claim. (a) One reason is that Congress has the constitutional power to require a state to respond in a federal court to the suit of a plaintiff who claims that he

was injured over navigable waters as to which the United States has paramount power. Admittedly, here the Congress has not in haec verba so required. But in a plethora of recent enactments Congress has subjected to liability not only others but, as the Federal Tort Claims Act emphasizes, the federal government itself to an obligation to meet in the United States Courts this type of claim. Only one who seeks a formal, technically-apt declaration would insist on more proof that Congress has adopted a policy of imposing liability on South Carolina. (b) A quite independent reason for my conclusion that the State of South Carolina cannot successfully invoke the Eleventh Amendment is that the State has clearly waived the application of that Amendment. The correspondence of the

parties shows that South Carolina consciously chose to be subject to liability as the price of continuing the cable in operation. In his April 7, 1977 letter Cobb informed Judge Blatt that the Highway Department was discussing with the South Carolina Attorney General the very course of conduct the Department adopted: i.e., "continued operation of the present ferry, with the liability that may be involved." What South Carolina's authorized representatives meant by "the liability that may be involved" is indisputable: it is the kind of liability on which Judge Blatt had premised judgment in Doyle v. U.S., supra. That is the very type of liability upon which rests the district court's judgment in this case. (c) A further independent reason for my

conclusion is that a waiver should be implied because it is plain that the United States would not have licensed South Carolina, and South Carolina would not have expected to receive a license from the United States, to lay a cable across navigable waters unless the State of South Carolina had impliedly, if not expressly, agreed to be liable for any injuries caused travellers by the negligent construction, operation, or maintenance of that cable. If such a cable were negligently constructed, operated, or maintained, the government of the United States would have been at least arguably (and, as this opinion declared, would indeed have been) liable for injuries caused by the continued operation of the cable. The liability is that which flows from ownership of an area upon which, with the owner's

consent, another person created or maintained the structure which caused the damage for which compensation is sought.

4. Contrary to my brethren, I regard the liability of the United States to the plaintiffs as fully supported by the Federal Tort Claims Act. If we had a suit against the City of Charleston, South Carolina, for an injury cause to the plaintiff by a barrier a third person negligently erected to block a public road, the City as owner of the roadway would be liable to the plaintiff. Pari passu the United States is liable to these plaintiffs.

decision that it made any attempt to carry out the Supreme Court's mandate a felony punishable by hanging without benefit of clergy.<sup>3</sup> Other reactions were only less extreme. At least part of the anti-Chisholm clamor sounded in self-interest: the states feared ruinous suits on Revolutionary War debts.<sup>4</sup> Contemporary critics, jealous and perhaps fearful of the newly created power of the federal judiciary, must also have heard the whisper of betrayal,

3. See G. Gunther, Cases and Materials on Constitutional Law 49 (9th ed. 1975).

4. See Cullison, "Interpretation of the Eleventh Amendment," 5 Houston L. Rev. 1, 7, 9, 16 (1967); Jaffe, "Suits Against Governments and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1, 19 (1963). Other pecuniary motives included the desire to avoid suits seeking restitution of confiscated Loyalist property and the desire to retain lands placed in the public domain by legislative fiat. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 57-62, 178 n. 72 (1972).

for the most ardent constitutionalists had given positive assurances that article III did not work a surrender of state sovereign immunity.<sup>5</sup> Within five years, Chisholm could claim the distinction of being the first Supreme

5. "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without (the Sovereign's) consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . ." The Federalist No. 81, at 487-88 (C. Rossiter ed. 1961) (A. Hamilton). This Blackstonian rhetoric, compare W. Blackstone, Commentaries on the Laws of England, Book I, ch. 7, at 235 (1765), may have been as much political expedient as political theory. Pollock and Maitland found sovereign immunity in England to be an historical "accident" caused by the pyramidal structure of feudal courts, and not a basic idea implicit in any concept of sovereignty. See 1 P. Pollock & F. Maitland, History of English Law 518 (2d ed. 1898).

Court case to be overruled by a constitutional amendment.

Eleventh amendment<sup>6</sup> jurisprudence has left no doubt that the amendment not only reversed Chisholm, but also countermanded any judicial inclination to interpret article III as self-executing abrogation of state immunity from suit, thereby reinstating the original understanding that the states surrendered sovereign immunity only to the extent inherent "in the acceptance of the constitutional plan."<sup>7</sup>

6. The eleventh amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

7. Monaco v. Mississippi, 292 U.S. 313, 330 (1934). The quoted language is a paraphrase of Hamilton's language in The Federalist No. 81, quoted in note 5, supra. Hamilton's understanding that the states had not surrendered their

It is therefore not suprising that the Surpeme Court, in deciding eleventh amendment cases, has focused not on the language of the eleventh amendment, but on the concept of sovereign immunity of which it is a reminder and "exemplification."<sup>8</sup> Thus, unlike the identical reference to "the judicial

7. (continued) sovereign immunity by ratifying article III is corroborated by statements of Madison and Marshall before the Virginia Convention. See 3 Elliot's Debates 533 (2d ed. 1901) (Madison); id. at 557 (Marshall), quoted in Monaco v. Mississippi, supra, at 323-24. The Monaco Court adopted Hamilton's view that the structure of the federal union implied that state sovereign immunity was limited in at least two cases: suits against a state by another state, see id. at 327-28; and suits by the United States against a state, see id. at 328-29.

8. See, e.g., Ex parte New York, 256 U.S. 497 (1921). See also H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 806-07 (tent.ed. 1958) (Court has treated eleventh amendment "as if it were a precedent to the opposite of Chisholm").

Power of the United States" in article III--a power which cannot be expanded by legislation<sup>9</sup> or by consent of the parties to a lawsuit<sup>10</sup>--the language of the eleventh amendment has not been interpreted to prohibit a suit once a state has given its consent.<sup>11</sup> Under a similarly flexible interpretation, suits against nonconsenting states brought by foreign nations are barred,<sup>12</sup> although this array of parties is not proscribed by the terms of the constitutional provision.

9. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

10. See Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884).

11. See Clark v. Barnard, 108 U.S. 436, 447 (1883) ("immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure")

12. Monaco v. Mississippi, 292 U.S. 313 (1934).

## APPENDIX

### FEDERAL JUDICIAL POWER

#### Section 3-35 The Eleventh Amendment as an Exemplification of Sovereign Immunity

In Chisholm v. Georgia,<sup>1</sup> the Supreme Court accepted original jurisdiction of a suit brought against the State of Georgia by two South Carolina citizens to collect a debt owed an estate. The Court took article III literally, refusing to condition the constitutional grant of authority to the federal courts to adjudicate "Controversies . . . between a State and Citizens of another State"<sup>2</sup> on the defendant state's consent to suit. Response to Chisholm was not mixed. The Georgia House of Representatives was so exercised by the

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1. 2 U.S. (2 Dall.) 419 (1793).

2. U.S.Const. art. III, Section 2.

the officer for the specific actions contested.<sup>22</sup> Second, if the plaintiff

22. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974); Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 50-51 (1944); In re Ayers, 123 U.S. 443, 500-01 (1887) ("the defendants, though professing to act as officers of the State, are threatening a violation of the personal or property rights of the complainant"). See also United States v. Lee, 106 U.S. 196 (1882) (action in ejectment against United States officers not barred by sovereign immunity). See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 930-37 (2d ed. 1973). One court has suggested that damage awards against an individual officer might violate the eleventh amendment if the officer were indemnified by the state. See Hallmark Clinic v. North Carolina Dep't of Human Res., 380 F. Supp. 1153, 1159-60 & n. 12 (E.D.N.C. 1974) (three-judge court). See also Edelman v. Jordan, 415 U.S. 651, 664 (1974) ("These funds will obviously not be paid out of the pocket of petitioner Edelman"). Such a voluntary assumption of an officer's liability ought to be insufficient to create eleventh amendment immunity. In the parallel case of intergovernmental tax immunities, assumption by the federal executive of state taxes levied against a private party is not enough to create tax immunity. See Section 6-28 to 6-30,

That the Court has thought it necessary to continue the unsatisfactory and conceptually unruly distinction between actions against a state officer individually and actions against the state<sup>24</sup> is itself testimony to the vitality of sovereign immunity in the constitutional scheme. Although the effect of sovereign immunity on the availability of judicial review has been narrowed by fiction, the operational concept of a sovereign immunity that is secure against judicial inroads has been

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24. Compare, e.g. In re Ayers, 123 U.S. 443 (1887) (contract clause action; suit by owners of tax coupons to enjoin state officials from allegedly destroying market for coupons by bringing actions against all persons attempting to use the coupons; held, eleventh amendment bars suit), with, e.g., Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952) (contract clause action: plaintiff sought injunction to prevent assessment of ad valorem taxes contrary to legislative charter; held, eleventh amendment is no bar).

retained in at least the core area of damage suits and of injunctions against the state as such. It is thus not surprising that, when the Supreme Court began to consider the power of Congress to authorize damage suits against the states under article I, it exhibited a schizophrenic approach: the Court proceeded simultaneously on the premise that states had retained a sovereign immunity which could be sacrificed only by a subsequent waiver, and on the premise that states had ceded part of their sovereignty to the national government in ratifying article I, thereby creating a limitation on sovereign immunity inhering in "the acceptance of the constitutional plan."<sup>25</sup>

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<sup>25</sup>. An excellent example of this schizophrenia can be found in Parden v.

25. (continued) Terminal Ry., 377 U.S.  
184, 192 (1964): "By empowering  
Congress to regulate commerce, then, the  
States necessarily surrendered any  
portion of their sovereignty that would  
stand in the way of such regulation . .  
. . Our conclusion is simply that  
Alabama, when it began operation of an  
interstate railroad approximately 20  
years after enactment of the FELA,  
necessarily consented to such suit as  
was authorized by the Act."

Section 3-36 The Conundrum of  
Constructive Waiver

Prior to 1964, eleventh amendment cases imposed an exacting requirement of proof of state consent to suit:

"express language or . . . such overwhelming implication from the text [of the state statute claimed to waive immunity] as would leave no room for any other reasonable construction."<sup>1</sup> But in Parden v. Terminal Railway,<sup>2</sup> the Supreme Court employed a new concept of

"constructive waiver" to remove the eleventh amendment bar to a negligence action brought by Alabama citizens under the Federal Employers Liability Act (FELA) against a railway owned by the State of Alabama and operated by it in

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1. Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

2. 377 U.S. 184 (1964).

interstate commerce. The Alabama constitution and Alabama Supreme Court decisions foreclosed the possibility that the state had actually "consented" to the suit under traditional standards. The FELA, however, specifically provided that "[e]very common carrier by railroad" engaged in interstate commerce would be liable in damages to injured employees in "an action . . . brought in a district court of the United States . . ."<sup>3</sup> The Parden Court held that this legislation transmuted the state's operation of the railroad into a constructive "waiver" of eleventh amendment immunity.<sup>4</sup> It insisted that Congress' power to regulate interstate commerce, delegated by the states in article I, is plenary and thus necessarily brooks no restraint by the

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3. 45 U.S.C.A. Sections 51, 56.

4. 377 U.S. at 190-92.

states on its exercise.<sup>5</sup> When Congress has authorized federal courts to entertain suits in the necessary and proper furtherance of the regulation of interstate commerce, sovereign immunity can be no bar.<sup>6</sup> For this reason, Alabama by its actions in operating a railroad subject to national regulation had "necessarily consented to such suit as was authorized by" the FELA.<sup>7</sup> The Parden Court refused to make state law dispositive of the waiver question, fearing that Congress' article I power would be rendered "meaningless if the State . . . could conclusively deny the waiver . . . ." <sup>8</sup> Thus, Parden clearly indicated that even a contemporaneous

5. Id. at 192.

6. Id.

7. Id.

8. Id. at 196.

state expression of nonconsent could be disregarded: "Where a State's consent . . . is alleged to arise from an act . . . within a sphere . . . subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law."<sup>9</sup>

In the 1973 case of Employees v. Department of Public Health and Welfare,<sup>10</sup> the Supreme Court reaffirmed Congress' power to bring "the States to heel, in the sense of lifting their immunity from suit in a federal court," but signaled that exercise of such power would not be presumed without clear evidence of congressional purpose. Thus, although section 16(b) of the Fair

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9. Id.

10. 441 U.S. 279, 283 (1973); see id. at 284-85.

The Supreme Court's understanding of the principle of sovereign immunity has, however, recognized the "acceptance of the constitutional plan" puts some limitations on the power of a state to avoid suit. Suits brought by sister states<sup>13</sup> or by the United States<sup>14</sup> are thus not prohibited. And neither sovereign immunity nor the eleventh amendment bars Supreme Court review of state court judgments in suits in which a state is a party, since supremacy of federal law requires review of the federal questions presented by such judgments.<sup>15</sup> If concerns of federalism

13. E.g., North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923).

14. E.g., United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

15. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 379-83, 407 (1821); accord, Smith v. Reeves, 178 U.S. 436, 445 (1900) (although state may limit consent to suits in its own courts, supremacy

are not present, however, a different result follow. Where the plaintiff is nominally another state but the suit is actually for the benefit of a discrete group of private citizens, eleventh amendment immunity can be invoked by the defendant state.<sup>16</sup>

A consistent vision of the eleventh amendment and state sovereign immunity is most severely tested by suits in

15. (continued) clause requires that federal questions decided be reviewable in the Supreme Court), discussed in Section 3-37, note 16, infra.

16. E.g., New Hampshire v. Louisiana, 108 U.S. 76 (1883) (eleventh amendment bars suit where plaintiff state is actually bringing suit for individual citizens); Hawaii v. Standard Oil Co., 405 U.S. 251, 258-59 n. 12 (1972) (same). But see Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 286 (1973) (eleventh amendment does not bar suits by the Secretary of Labor on behalf of employees to collect back pay under Fair Labor Standards Act because suits by the United States are not barred by the amendment). See Section 3-37, note 15, infra.

which a plaintiff seeks relief on the basis of an asserted federal constitutional right. It is at least arguable that, in ratifying the constitutional plan, the states surrendered sovereign immunity from suits testing the constitutional limits of state action.<sup>17</sup> As a doctrinal matter, however, the law is settled the other way, for Hans v. Louisiana<sup>18</sup> is conventionally thought to stand for the proposition that sovereign immunity bars even suits arising under the Constitution or laws of the United States.<sup>19</sup> In Hans, a citizen of

17. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379-83, 407 (1821).

18. 134 U.S. 1 (1890).

19. See, e.g., Parden v. Terminal Ry., 377 U.S. 184, 186 (1964); accord, Duhne v. New Jersey, 251 U.S. 311, 313 (1920) (mem.) (suit to enjoin enforcement of eighteenth amendment barred); Smith v. Reeves, 178 U.S. 436, 446-48 (1900)

Louisiana sued to recover damages, alleging that the state's failure to pay its bonds violated the contract clause of the Constitution.<sup>20</sup> Although Hans might easily be limited on the ground that an opposite holding would have resurrected Chisholm to the extent of making states legally liable on their debts, it has not been so narrowed.

The rule of Hans has not, however, totally frustrated attempts to use the judiciary to protect individual rights from unconstitutional state action. Instead, the courts have distinguished suits against the state from suits against an individual officer even

19. (continued) (eleventh amendment bars suits arising under constitution); Fitts v. McGhee, 172 U.S. 516, 524-25 (1899) (suit alleging violation of due process clause barred).

20. See 134 U.S. at 1-2.

though compliance by the officer will often be compliance by the state and the costs of compliance will be borne by the state treasury.<sup>21</sup> Under this which a plaintiff seeks relief on the which a plaintiff seeks relief on the distinction, two principal types of cases have been allowed to proceed. First, suits for money damages against an agent of the state in the agent's individual capacity are not barred: the damages are payable by the officer, provided primary and remedial law gives the plaintiff a cause of action against

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21. The nature of the distinction drawn is most clearly articulated in Edelman v. Jordan, 415 U.S. 651 (1974), where the Court reversed a district court order requiring state welfare officials to payout illegally withheld welfare benefits: "[The order] requires payments of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation." Id. at 668.

does not make the gross pleading error of naming the state as defendant, injunctive relief against a state officer is not prohibited.<sup>23</sup>

22. (continued) infra. For the same reasons, a state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity. Alternatively, the state's voluntary extension of indemnification could be construed as a waiver of eleventh amendment immunity. See Section 3-36, infra.

23. Thus the seminal importance of Ex parte Young, 209 U.S. 123 (1908), which established an equitable cause of action against state officers in their individual capacities, the eleventh amendment notwithstanding, for violations of constitutional rights, and of Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913), which established the fourteenth amendment as a substantive rule of conduct binding on state officials individually regardless of whether or not the state had officially sanctioned their actions. Young and Home Telephone thus enabled plaintiffs to allege "state action" sufficient to trigger the fourteenth amendment without automatically raising the bar of the eleventh. See Sections 3-38, 18-4, infra.

however, willing to find waiver in the circumstances of Parden where Alabama had "legal notice" of the FELA prior to

36. (continued [2]) sue a state, on an analysis of Congress' article I powers or on an analogy to Testa v. Katt, 330 U.S. 386 (1947), which established a general constitutional duty for states to vindicate federal claims in their own courts to the extent they would entertain parallel state claims. The former proposition presents no difficulty, but the latter is too sanguine a reading of Testa, which required state courts to award multiple damages as prescribed by federal law where state law provided for multiple damage remedies. It is well established that a state may not discriminate against federal claims. Compare Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929) (state is not obliged to entertain nonresident's FELA claim against foreign corporation where state law denies jurisdiction in similar state cause of action suits), with McKnett v. St. Louis & S. F. Ry., 292 U.S. 230 (1934) (if state entertains all other suits against foreign corporations, it may not decline to hear FELA claim against foreign corporation). But Justice Marshall would apparently require state courts to entertain FLSA suits against the state whenever the state law includes an analogous wage-and-hour statute, even though state law gives no cause of action against the

the states to provide back pay to victims of the states' discrimination: "When Congress acts pursuant to Section 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority."<sup>26</sup>

In the decade following Parden, the Supreme Court's stance on eleventh amendment issues had significantly shifted. Parden would make states amenable to suit in federal court whenever they undertake an activity for which a private person could potentially be held liable under a valid federal

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26. Id. at 452. See Section 5-22, infra.

law.<sup>27</sup> The Parden majority thus posited no distinction between the states and other entities that might be regulated by federal legislation. Employees and Edelman, on the other hand, treat states as distinguished from other entities by federalism considerations.<sup>28</sup> For this reason, the amenability of states to suit must be specifically addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear.<sup>29</sup>

27. See Employees, 411 U.S. at 300 (Brennan, J., dissenting); accord, Edelman, 415 U.S. 687-88 (Brennan, J., dissenting).

28. "[W]e decline to extend Parden to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the supremacy clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear." Employees, 411 U.S. at 286-87.

29. See Edelman, 415 U.S. at 672; Employees, 411 U.S. at 285 (unless Congress indicates "In some way by clear

This policy of clear statement had been rejected by the Parden majority, but Justice White's formulation of the policy in his Parden dissent eventually prevailed:<sup>30</sup> It should not be easily inferred that congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another. Only when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense. Thus in Employees, Justice Douglas

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29. (continued) language that the constitutional immunity [is to be] swept away," the Court will not infer that Congress "desired silently to deprive the States" of immunity).

30. Parden, 377 U.S. at 198-99.

searched the FLSA legislative history in vain for "a word . . . to indicate a purpose of Congress to make it possible for a citizen . . . to sue the State in the federal courts."<sup>31</sup> And in Edelman, the Court indicated that, in the absence of waiver, it could not find an abrogation of eleventh amendment immunity unless satisfied that the "threshold fact of congressional authorization to sue a class of defendants which literally includes States" had been established.<sup>32</sup> Fitzpatrick also took the clear statement tack; although he invoked Parden, Justice Rehnquist did not actually rely upon Parden's broad rule, but rather grounded his approval of the

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31. 411 U.S. at 285

32. 415 U.S. at 672.

congressional action in the fourteenth amendment's specific limitations on state sovereignty.

Justice Marshall has charted yet another course.<sup>33</sup> On his view, the original grant of federal judicial power in article III did not authorize federal courts to entertain suits against non-consenting states; Chisholm was an unfortunate mistake; and the eleventh amendment was necessary to reestablish one of the bedrock political conceptions underlying article III.<sup>34</sup> Because

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33. See Employees, 411 U.S. at 287 (Marshall, J., concurring).

34. Id. at 290-91. In discussing Parden, however, Justice Marshall has indicated that he may consider the eleventh amendment as a restoration of power surrendered in the original constitutional scheme. See id. at 288-89. This, of course, would mean that Chisholm was right, and that the eleventh amendment corralled, but did not correct, the federal judiciary.

eleventh amendment immunity thus reaffirms a right retained by the states, it can be relinquished only by "the sort of voluntary choice which we generally associate with the concept of constitutional waiver."<sup>35</sup> Absent such a choice, Justice Marshall would deny that even the most explicit congressional specification of state amenability to suit can empower a federal court to hear a case.<sup>36</sup> Justice Marshall was,

35. Id. at 296. Although Justice Marshall's opinion in Employees used the idiom of private rights, he wisely did not posit a complete congruence between state immunities and private rights, concepts at best tenuously connected.

36. Id. at 293-97. Justice Marshall argued that, although Congress could not compel a state to submit to a Section 16(b) suit in federal courts, it could compel such submission in state courts. See id. at 297-98. It is not clear, however, whether Justice Marshall based his assertion that the eleventh amendment is "nothing more than a regulation of the forum," id. at 298, in which a federal-question plaintiff may

beginning its railroad operations.<sup>37</sup>  
The difficulty with Justice Marshall's position, however, is that it proves too much. For if states have a right under article III and the eleventh amendment not to be subjected to unconsented suits in federal court, then it would seem that Congress lacks the power to condition even their subsequent entry into various activities upon state forfeiture of that right, however knowing and voluntary.<sup>38</sup> Even a state

36. (continued [2]) state itself. See 411 U.S. at 297-98 & n. 12. This clearly oversteps Testa's bounds: How can a state be charged with discrimination against a federal claim when it allows no suits in state courts against the sovereign?

37. 411 U.S. at 296.

38. See, e.g., Terral v. Burke Const. Co., 257 U.S. 529 (1922) (corporation cannot be compelled to waive right to resort to federal courts in order to do business in state); cf. Shapiro v. Thompson, 394 U.S. 618 (1969) (durational residency requirement for

that "chose to participate in an unconstitutionally conditioned program with its eyes wide open"<sup>39</sup> would presumably be protected against imposition of an independently offensive condition. The only ready escape from that conclusion is to deny that the state in fact has a right, in the sense that private persons have rights, against congressionally compelled

38. (continued) receipt of welfare benefits invalidated as burden on right to travel); United States v. Jackson, 390 U.S. 570 (1968) (unconstitutional to force defendant to choose between guilty plea and trial by jury where jury, but not judge, could impose death penalty). See generally Hale, "Unconstitutional Conditions and Constitutional Rights," 35 Colum. L. Rev. 321 (1935); Note, "Unconstitutional Conditions," 73 Harv. L. Rev. 1595 (1960); Note, "Another Look at Unconstitutional Conditions", 117 U.Pa. L. Rev. 144 (1968). But see note 35, supra.

39. Edelman, 415 U.S. at 893 (Marshall, J., dissenting).

Labor Standards Act (FLSA) made employers liable to private damage suits "in any court of competent jurisdiction,"<sup>11</sup> the Court declined to construe a 1966 amendment extending the Act's coverage to state hospitals and schools<sup>12</sup> as enforcing a corresponding waiver of eleventh amendment immunity.<sup>13</sup> The Court indicated that the authority of the Secretary of Labor to bring suit

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11. 29 U.S.C.A. Section 216(b).

12. See id. Sections 203(d), (r), (s).

13. See 411 U.S. at 285. The Court seemed influenced by two notions: first, that the schools and hospitals in Employees were somehow more an expression of "sovereign" power and less an extension of "proprietary" state interests than the railroad in Parden, sec 411 U.S. at 284-85; Parden v. Terminal Ry., 377 U.S. 184, 196 (1964) (semble) ("when a State leaves the sphere that is exclusively its own"); and second, that the double damages provision of Section 16(b) appeared inconsistent with a "harmonious federalism," 411 U.S. at 286.

to enjoin further violation and recover unpaid wages adequately safeguarded federal interests in FLSA enforcement.<sup>14</sup> The stark result in Employees, however, was that the remedies available for FLSA violations affecting public employees were limited by the preexisting presumption that "a federal court is not competent to render judgment against a nonconsenting State."<sup>15</sup>

Edelman v. Jordan,<sup>16</sup> decided in 1974, continued the Court's chary approach to constructive waiver. The Edelman Court held that a federal district court could not order Illinois officials to "release and remit" federally-subsidized welfare benefits

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14. 411 U.S. at 285-86.

15. Id. at 284.

16. 415 U.S. 651 (1974).

illegally withheld from Illinois citizens.<sup>17</sup> The Court concluded that state participation in a federal program could not in itself be taken to signify "consent on the part of the State to be sued in the federal courts."<sup>18</sup> State officers may be sued in federal court to compel future compliance with welfare regulations,<sup>19</sup> but the Court declined to find constructive waiver where the "only

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17. Federal regulations provided that benefits under the Aid to the Aged, Blind, and Disabled categorical grant program should be paid within a prescribed period following submission of a qualifying application. Illinois paid benefits only after applications were approved, even if state application review procedures overran the federal deadlines. Id. at 653-55 & nn. 3, 4.

18. 415 U.S. at 673.

19. See, e.g., Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). They may also be sued to compel them to share future costs of compliance with a decree remedying violations for which they shared responsibility. Milliken v. Bradley (II), 97 S.Ct. 2749 (1977).

language in the [federal legislation] which purported to provide a federal sanction against a State [by cutting off future fund] . . . by its terms did not authorize suit against anyone . . . ."20

Finally, in Fitzpatrick v. Bitzer,<sup>21</sup> the Court found the clear evidence of congressional purpose it could not find in Employees and Edelman. Congress, in adopting the Equal Employment Opportunity Act of 1972,<sup>22</sup> had amended Title VII of the Civil Rights Act of 1964<sup>23</sup> to include "governments, governmental agencies [and] political subdivisions"<sup>24</sup> among the employers

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20. 415 U.S. at 674.

21. 427 U.S. 445 (1976).

22. 86 Stat. 103.

23. 42 U.S.C.A. Section 2000e et seq.

24. Id. Section 2000e(a); see 427 U.S. at 449 n. 2.

subject to Title VII's prohibition of discriminatory employment practices and its corollary authorization of employee back pay actions. Such congressional action, the Fitzpatrick Court concluded, revealed "congressional intent to abrogate the immunity conferred by the eleventh amendment" to be "clearly present."<sup>25</sup> Thus, the prerequisite for application of Parden's constructive waiver doctrine, absent in Employees and Edelman, had at last been met; the only issue was whether Congress in this case indeed possessed the power to roll back the states' eleventh amendment immunity. Treating the 1972 Act as an exercise of congressional authority under Section 5 of the fourteenth amendment, the Court held that Congress could in fact require

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<sup>25</sup>. 427 U.S. at 451-52.

amenability to suit in federal court.<sup>40</sup>  
This possibility in turn suggests a  
broader reformulation of the theory  
underlying Parden and its progeny.

40. Another possible alternative would be to approve enforced waiver only when the need is "compelling." Cf. Storer v. Brown, 415 U.S. 724, 728-37 (1974) (statute burdening right to vote upheld because of compelling state interest). Such an approach, however, partakes of the difficulty inherent in distinguishing between measures that are merely rationally related to achieving a legitimate federal purpose and those that are absolutely necessary. See Note, "The First Amendment Overbreadth Doctrine," 83 Harv. L. Rev. 844, 914 (1970). Moreover, a case-by-case search for "compelling" federal interests in coerced waiver of state immunity would enable the federal courts to deny sovereign immunity on the basis of their independent evaluation of federal interests: this would be tantamount to using the article III grant of federal question jurisdiction to abrogate sovereign immunity, a result against which the eleventh amendment surely argues. See, e.g., Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973) (federal question jurisdiction insufficient to prevent successful plea of sovereign immunity):

40. (continued) Duhne v. New Jersey, 251  
U.S. 311 (1920) (~~same~~): Hans v.  
Louisiana, 134 U.S. 1, 15 (1890)(~~same~~).

Section 3-37 An Alternative Theory of  
Eleventh Amendment Abrogation

The only satisfying reconciliation of the cases with a conception of the eleventh amendment as either conferring a category of rights upon the states or at least confirming the states' retention of rights against unconsented suit, is to distinguish rights conferred against the federal judiciary from rights conferred against Congress.

Nothing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power under the commerce clause or under any other head of affirmative legislative authority. A better account of the relationship between the substantive lawmaking competence delegated by article I and

the federal judicial power delimited by article III is available.

Article III permits federal adjudication of suits against states that are properly authorized pursuant to article I, but article III does not of its own force abrogate the defense of sovereign immunity when that defense would otherwise be cognizable in federal court. Five years after Chisholm v. Georgia<sup>1</sup> had erroneously construed article III to the contrary, the eleventh amendment, in declaring that the federal "judicial power . . . shall not be [so] construed," restored the original understanding. But in scuttling the notion that article III had the self-executing effect of abrogating state sovereign immunity in federal tribunals, the eleventh

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1. 2 U.S. (2 Dall.) 419 (1793).

amendment carved no new limits for the permissible reach of otherwise valid federal legislation. On this view, it remains true after the eleventh amendment, just as it was true prior to Chisholm, that Congress, acting in accordance with its article I powers as augmented by the necessary and proper clause, or acting pursuant to the enforcement clauses of various constitutional amendments,<sup>2</sup> can effectuate the valid substantive purposes of federal law by (1)

2. U.S. Const. amend. XIII, Section 2: id. amend. XIV, Section 5: id. amend. XV, Section 2: id. amend. XIX el. 2: id. amend. XXIV, Section 2: id. amend. XXVI Section 2; see Katzenbach v. Morgan, 384 U.S. 641 (1966): cf. United States v. Mississippi, 380 U.S. 128 (1965) (suit in federal court by United States on behalf of individuals authorized under congressional implementation powers granted by Section 2 of the fifteenth amendment).

compelling states to submit to adjudication in federal courts and/or (2) compelling states to entertain designated federal claims in their own courts.

The soundness of the approach advocated here depends in large measure upon the justifiability of treating congressional decisions to make jurisdictional inroads upon state sovereignty as different in kind from judicial decisions to do so. Such a difference in treatment is clearly not prohibited by the language of the eleventh amendment, which literally limits only the judicial power. It is also consistent with limitations on sovereignty inhering in the constitutional plan. Article I envisions that the national government will have plenary power to regulate

certain subjects when, in the clearly expressed opinion of Congress, such regulation would serve the nation's interests. Moreover, as Fitzpatrick v. Bitzer<sup>3</sup> explicitly recognizes, the fourteenth amendment, also an important source of congressional power, is itself framed as a limit on state action. To the extent that sovereign immunity would free a state from such national controls, that immunity is inconsistent with the constitutional plan.<sup>4</sup> In addition, it has generally been perceived that the states are well represented in Congress, so that Congress will be attentive to concerns of state governments as separate

3. 427 U.S. 445 (1976), discussed in Section 3-36, supra.

4. See Parden v. Terminal Ry., 377 U.S. 184, 190, 192 (1964) (sovereign immunity would frustrate national legislation).

sovereigns.<sup>5</sup> Subject to the state  
sovereignty limit implied in the tenth

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5. See, e.g., The Federalist No. 45, at 291 (C. Rossiter ed. 1961) (J. Madison) (federal power checked by state influence over President, Senate, and House of Representatives); id. No. 46, at 296 (tendency will be for Congress to have a local bias because of state representation); Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 Colum. L. Rev. 543, 546 (1954). See also Cohen, "Congressional Power to Interpret Due Process and Equal Protection," 27 Stan. L. Rev. 603 (1975) (using doctrine of states representation in Congress to justify congressional power under U.S. Const. amend. XIV, Section 5, to limit state power more severely than a court implementing id. Section 1); Mishkin, "Some Further Last Words on Erie--The Thread," 87 Harv. L. Rev. 1682, 1683, 1685 (1974) ("That Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges . . . [in part because] the states, and their interests as such, are represented in the Congress but not in the federal courts."). Even if some of the means state governments could originally employ to influence Congress are no longer available, e.g., U.S. Const. amend. XVII (state legislatures no

amendment,<sup>6</sup> this analysis merely extends that perception into a means of assessing the proper reach of state litigational immunity in the federal system.

As a corollary, the clear statement approach of Employees and Edelman<sup>7</sup> would be retained under the approach advocated here, albeit for the somewhat different reason that courts should not abrogate state immunity unless they are sure that Congress has considered the federalism

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5. (continued) longer choose U.S. Senators), the comparative proposition that the interests of state governments are more likely to find voice in Congress than in the other two federal branches continues to remain persuasive. See generally Sections 5-7, 5-20 to 5-22, infra.

6. See Sections 5-20 to 5-22, infra.

7. Employees v. Department of Public Health & Welfare, 411 U.S. 279, 285 (1973); Edelman v. Jordan, 415 U.S. 651, 672 (1974), discussed in Section 3-36, supra.

interests compromised by suits against states. By making a law unenforceable against the states unless a contrary intent is apparent in the language of the statute, the clear statement rule would further ensure that attempts to limit state power will be unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interest.<sup>8</sup> Thus a

8. It is instructive that the Supreme Court has imposed such a clear statement requirement where state institutional interests would have been undetermined by a judgment construing a federal statute's reach as coextensive with the commerce power. Thus, the Court has narrowly construed federal laws criminally punishing "conduct readily denounced as criminal by the State." United States v. Bass, 404 U.S. 336, 349 (1971), on the ground that, "unless Congress conveys its purposes clearly, it will not be deemed to have significantly changed the federal-state balance." Accord, United States v. Emmons, 410 U.S. 396 (1973); Rewis v. United States, 401 U.S. 808 (1971); United States v. Five Gambling Devices,

recognition of the peculiar  
institutional competence of Congress in  
adjusting federal power relationships

8. (continued[1]) 346 U.S. 441 (1953)  
(Jackson, J., plurality opinion).

Once it is admitted that Congress can abrogate state sovereign immunity, a subsidiary question arises: Why must a court wait for Congress to act when Congress can always reverse what a court has done? The answer seems two-fold. First, the only operational meaning one can attribute to the concept of sovereign immunity is that, as with a political question, a court must accept another body's determination of an issue without reweighing the substantive balance to see if the court agrees. See Section 3-16, supra. Thus, allowing courts to "go first" would dilute the concept of immunity into virtual meaninglessness. Second, ratification by congressional silence is scarcely consistent with the considerations underlying the clear statement requirement. The point of that requirement is to make sure that state concerns are given an adequate airing in congressional processes of decision. Ex post consideration of sovereign immunity seems to depart from this attention to process, and is thus deficient, both (1) because it seems unlikely that Congress will actually take up a sovereign immunity complaint given the low motive power of abstract sovereignty concerns, see Wechsler, supra Note 5, at 547-48; and (2) because, even if sovereign

makes this an appropriate and useful approach to reconciling national power with state litigational immunity.<sup>9</sup>

8. (continued [2]) immunity is considered, it seems unlikely that Congress can be persuaded to reopen debate on the policy balance struck in a program already passed in order to "fine tune" that policy with respect to the states. There is, however, one situation in which judicial abrogation of sovereign immunity, subject to congressional veto, might be justified. When a court implies a remedy under a constitutional rule that limits both national and state power (e.g., due process), it seems more likely that the court will in the first instance consider the claims of the states since those may largely parallel those of the federal government. It also seems more likely that a decision infringing state interests in such a case might be overturned by Congress because "the interests of the states and nation in removing unduly intrusive common law would overlap, thereby maximizing the 'clout' which the states enjoy in Congress." Monaghan, "The Supreme Court, 1974 Term--Foreword: Constitutional Common Law," 89 Harv. L. Rev. 1, 37 (1975).

9. See Section 2-3, supra.

Congressional power to abrogate the states' sovereign immunity is not, however, completely unfettered. Three limiting principles seem to follow from the constitutional plan. First, Congress cannot confer upon an article III court any authority to resolve disputes outside the textual confines of that article.<sup>10</sup> Second, any congressional attempt to confer jurisdiction and abrogate immunity must be reasonably ancillary to an otherwise valid substantive exercise of federal lawmaking power. Third, insofar as the tenth amendment "expressly declares the

10. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). But see National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 591-92 (1949) (plurality opinion) ("It is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III . . .").

constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system",<sup>11</sup> the Supreme Court should not lightly infer serious congressional inroads upon state autonomy. In particular, the clearer the history of state attempts to immunize institutions and activities from accountability in a federal forum, and the more onerous the restriction on state options represented by a coerced waiver of immunity,<sup>12</sup> the more courts

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11. Fry v. United States, 421 U.S. 542, 547-48 n. 7 (1973). See National League of Cities v. Usery, 426 U.S. 833 (1976), discusses in Section 5-22, infra

12. The restriction on options is greatest when the state is put to the choice, as it would have been in Employees, between being dragooned into federal court by a private party and "ceasing operation of . . . vital [pre-existing] public services," Employees v. Department of Pub. Health &

should insist that Congress act in a fashion demonstrating full appreciation of the consequences for federalism. To be sure, a sufficiently "drastic invasion of state sovereignty"<sup>13</sup> could

12. (continued) Welfare, 411 U.S. 279, 296 (1973) (Marshall, J., concurring). These concerns are often encapsulated in the labels "sovereign" and "proprietary", see, e.g., Fry v. United States, 421 U.S. 542, 549 (1973) (Rehnquist, J., dissenting); Employees v. Department of Pub. Health & Welfare, 411 U.S. at 284-85, but unfortunately the boundary between the proprietary and the sovereign is both difficult to mark conceptually and difficult to locate over time. This guideline has been suggested less as a limit on congressional power to abrogate eleventh amendment immunity, cf. Maryland v. Wirtz, 392 U.S. 183, 195 (1968) (rejecting similar distinction in commerce clause case), than as a factor to be considered in determining how clearly Congress must express its purpose to abrogate state immunity with respect to the activity in question. For a suggested way of giving the guideline greater content, see Section 5-22, infra.

13. Fry, 421 U.S. at 547-48 n. 7.

be invalidated notwithstanding even the clearest possible expression of congressional purpose, but any such invalidation would rest ultimately on tenth rather than eleventh amendment grounds.<sup>14</sup>

The theory suggested here would certainly lead to the same result in Fitzpatrick; it would probably lead to the same result in Parden in light of the relative clarity of the FELA and the proprietary character of the railroad activity there involved, and to the same results in Employees and Edelman in light of the governmental character of the activities involved in both cases and the lack of clear congressional

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<sup>14</sup>. Tenth amendment jurisprudence is discussed in Sections 5-20 to 5-22, infra.

statement in either.<sup>15</sup> But in other situations the theory could well produce different results from those indicated by a search for constructive waiver;<sup>16</sup>

15. Employee, however, permitted the Secretary of Labor to bring suit for back pay on behalf of aggrieved employees. The Court strangely did not apply the same standard of clear statement to language in the FLSA authorizing suit by the Secretary as it did to language providing for private damage actions. The Court may have assumed that such suits were automatically authorized because suits by the United States are not within the ban of the eleventh amendment, but it does seem anomalous that when a state brings suit on behalf of individuals (rather than in its sovereign capacity), the suit is barred, but is not barred when the federal government undertakes a similar enterprise. See Section 3-35, note 16, supra.

16. This interpretation of the eleventh amendment suggests that the doctrine of Smith v. Reeves, 178 U.S. 436 (1900), be reconsidered. In Smith, the Court held that the eleventh amendment allowed a state to consent to suit in its own courts but to retain eleventh amendment immunity in federal courts. This doctrine has been applied in later cases without consideration of the qualifications imposed in Smith--that the legislation waiving sovereign

it would comport better with the notion that waivers of constitutional rights cannot be demanded as a condition of receiving a government benefit; and it seems more faithful to the history of the eleventh amendment itself.<sup>17</sup>

16. (continued) immunity not evince any hostility toward the federal government, and that it not trench upon any federal right, see *id.* at 445. See, e.g., Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909). If the eleventh amendment stands for no more than the proposition that article III is not a self-executing abrogation of state sovereign immunity, then the amendment alone should provide no justification for a state consent which discriminates against a federal instrumentality. Cf. United States v. City of Detroit, 355 U.S. 466, 473-74 (1958) (dictum) (state may not discriminate against United States in setting tax rates); Railway Co. v. Whitton's Adm'r, 80 U.S. (13 Wall.) 270 (1871) (state may not restrict general wrongful death cause of action to state courts). As was recognized in Smith itself, however, other factors--such as the necessities of administering a state tax system--may negate any inference of hostility, thereby validating the state's partial consent.

17. See Nowak. "The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments," 75 Colum.L.Rev. 1413 (1975). The argument advanced here has been addressed to the narrow question of the eleventh amendment's impact on congressionally created damage (or injunction) actions running directly against the states. But the argument, which is based both on constitutional structure and on the peculiar characteristics of the federal legislative process, has implications for the larger question of when, if ever, it may be appropriate for a federal court to imply a cause of action for damages against the states. See, e.g., Brown v. Kentucky, 513 F.2d 333 (6th Cir. 1975) (rule 10b-5 claim against Commonwealth of Kentucky held barred by eleventh amendment under Edelman and Employees); cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 390-97 (1971) (damage remedy against federal officers); Monroe v. Pape, 365 U.S. 167 (1961) (damage action under 42 U.S.C.A. Section 1983 does not run against municipalities). With limited exceptions, e.g., Vermont v. New York, 417 U.S. 270, 277 (1974) (interstate disputes); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 381-403 (1970) (admiralty), federal common law, see Section 3-31, supra, is grounded not on grants of jurisdiction in article III, but on the unavoidable lawmaking functions of a court asked to decide statutory questions, see, e.g., D'Oench, Duhne & Co., v. Federal Deposit Ins. Co., 315 U.S. 447, 470 (1942) (Jackson,

17. (continued [1]) J., concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all- complete statutory codes, and is apparent from the terms of the Constitution itself"); or on grants of power to the national government, see, e.g., Note, "The Competence of Federal Courts to Formulate Rules of Decision", 77 Harv.L.Rev. 1084 (1964); or on limitations upon government found in various sections of the Constitution, see Monaghan, supra note 8. But see Dellinger, "Of Rights and Remedies: The Constitution as a Sword", 85 Harv.L. Rev. 1532, 1541-42 (1972) (common law based on article III). Thus, the eleventh amendment, understood merely as a reminder that article III is not a self-executing abrogation of sovereign immunity, arguably does not bar judicially implied damage remedies.

The simplicity of this conclusion is marred by two considerations. First, the argument presented here for Congress' power to abrogate state sovereign immunity is based both on constitutional structure and on peculiar characteristics of the legislative process making it reasonable to suppose that state interests will be adequately considered. It would be highly incongruous for a federal court to insist upon a policy of clear statement as a means of ensuring an adequate legislative consideration of states' interests if the legislative process itself were so unimportant that a court finding no congressional intent to abrogate immunity, could simply create its own cause of action. Second, were

17. (continued [2]) courts to imply damage remedies, it would be difficult to identify the significance of the sovereign immunity preserved by Hans v. Louisiana, 134 U.S. 1 (1890), and kept alive, even after Ex parte Young, 209 U.S. 123 (1909), by the largely fictional device of distinguishing suits against state officers. In addition, the need to imply a damage remedy against a state is minimal. Since cities and other political subdivisions are not ordinarily sheltered by a state's eleventh amendment immunity, see e.g., Mt. Healthy City School Dist. v. Doyle, 97 S.Ct. 568 (1977), and since state or municipal officers can be sued for damages and injunctive relief in their individual capacities for violations of federal rights, there would ordinarily be little occasion to augment a plaintiff's available remedies with a damage action against the state. Even in the unusual case, where the only defendant is the state, damage liability has been firmly rejected by the contract clause cases. See, e.g., Hans V. Louisiana, supra; In Re: Ayers, 123 U.S. 443 (1887). Although these considerations by no means conclusively determine that courts should never imply damage remedies against the states, they at least suggest that courts should be hesitant to do so.

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Alean Hester FAUST, Administratrix of the  
Estate of Charles Lonnie Faust, Deceased,  
Plaintiff,

v.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT,  
Defendant, and,

United States of America, Defendant and  
Third Party Plaintiff.

Tommy BENNETT, Plaintiff,

v.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT,  
Defendant, and,

United States of America, Defendant and  
Third Party Plaintiff.

Curtis L. MULDROW, Plaintiff,

v.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT,  
and,

United States of America, Defendant and  
Third Party Plaintiff.

Civ. A. Nos. 78-776, 78-778, and 78-780.

United States District Court  
D. South Carolina  
Charleston Division

December 11, 1981

HAWKINS, District Judge.

These cases consolidated for trial and heard by this court during its term beginning November 16, 1981, in Georgetown, South Carolina, arose as a result of an accident which occurred at the South Island Ferry in Georgetown, South Carolina, on December 11, 1977. Charles Lonnie Faust, the decedent, Tommy Bennett and Curtis L. Muldrow had been fishing in the waters of Winyah Bay and were attempting to return to the landing from which they had launched their boat when they collided with the guide cable of the South Island Ferry. The collision caused the death of decedent Faust and personal injuries to Bennett and Muldrow. Following the collision the plaintiffs brought these actions against the South Carolina State Highway Department, now known as the South Carolina Department of Highways and Public Transportation, the owner and operator of

the ferry, and the United States of America as joint tort feorsors. The defendants answered denying liability and at the same time asserting cross-claims against each other for contribution and counterclaims against the estate of the owner and operator of the boat, Charles Lonnie Faust. Having heard the testimony, studied the exhibits, and having fully reviewed all the evidence, the court makes the following findings of fact and conclusions of law:

#### I-FINDINGS OF FACT

##### A. Background

1. Prior to 1900, as part of the construction of the Intracoastal Waterway in Georgetown County, the United States Corps of Engineers (hereinafter referred to as "Corps") dug a canal from Winyah Bay to the Santee Delta. This canal, known as the Estherville-Minim Canal, runs generally in a north-south direction and separates South Island from the rest of Georgetown County. After construction of the canal, access

**APPENDIX C**

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James. C. Rushton, III, William P. Hatfield, Regionald C. Brown, Jr., and Peter D. Hyman, Florence, S.C., Hal Strange and Douglas L. Hinds, Georgetown, S.C., for plaintiff Faust.

D. A. Brockinton, Jr., Brockinton, Brockinton & Smith, P.A., Charleston, S.C., for plaintiffs Bennett and Muldrow.

Ellison D. Smith, IV, Charleston, S.C., Victor S. Evans, Deputy Atty. Gen., Columbia, S.C., for defendant S.C. State Hwy. Dept.

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from the mainland to South Island was afforded by the construction of a wooden bridge which has long since been destroyed. Thereafter, beginning approximately in 1920, access to South Island was available by ferry provided by Georgetown County, said ferry being located one (1) mile from the waters of Winyah Bay.

2. In 1940, the South Carolina General Assembly shifted the burden of and responsibility for the operation of the ferry from Georgetown County to the South Carolina Highway Department (hereinafter referred to as "Highway Department") with the passage of a statute, now embodied in §57-15-140 of the 1976 Code of Laws of South Carolina, as amended, which incorporated the ferry and its approaches into the South Carolina Highway System as a portion of State Highway No. 716. The statute further directed the Highway Department to maintain and operate the ferry.

3. The Intracoastal Waterway is a part of the navigable waters of the United States and is a highway for barge and pleasure boat traffic. Since its construction, the Corps has dredged and maintained the waterway which is approximately 300 feet wide.

During its years of operation since 1940, the ferry operated at the South Island crossing has been a cable operated ferry. As an integral part of the cable operated ferry, there was a 5/8" steel cable which was used as a guide cable to stabilize the ferry during crossings.

4. It appears that no known records are kept as to the number of boats that pass through this portion of the waterway during a given period of time; however, the majority of vessels are pleasure boats and tow vessels. Construction by Georgetown County of a boat landing adjacent to the ferry has resulted in a tremendous increase in traffic by local fishermen and other

boaters in the area of the ferry within recent years.

5. From 1955 to 1975, approximately forty (40) accidents involving the ferry occurred. Most of the accidents were minor, and most involved pleasure boats colliding with the guide cable. For the years 1971 to 1975, the South Carolina Department of Marine and Wildlife Resources investigated seven accidents involving collisions between boats and the guide cable, and forwarded the United States Coast Guard (hereinafter referred to as "Coast Guard") copies of their reports. The Coast Guard for that same period investigated five accidents (two of which were also investigated by the South Carolina Department of Marine and Wildlife Resources).

6. On October 9, 1974, John W. Fulton (hereinafter referred to as "Fulton") was killed, after nearly being decapitated, when his boat struck the guide cable for

the South Island Ferry. The only other passenger in the boat, Carol Feaga (hereinafter referred to as "Feaga") was seriously injured. Fulton had been traveling from his home in Maryland south on the Intracoastal Waterway to Florida.

7. At the time of the October 1974 death of Fulton, the ferry warning system consisted of 4' X 6' signs upstream and downstream of the cable. The signs were on both sides of the channel and simply stated, "Caution-Ferry Crossing-.10 mile". The signs failed to inform boaters of the dangers posed by the cable when the ferry was in operation. Five red flashing lights were on the ferry boat, and a siren could be sounded by the operator from the island side. Use of the siren was not available once the ferry commenced a trip.

8. On November 21, 1974, Coast Guard Commander M. J. Stewart, the Marine Safety Officer responsible for the South Carolina Zone wrote District Engineer Catoe

(hereinafter referred to as "Catoe"), who was responsible for all maintenance, construction and engineering activities in his district of the Highway Department and advised him of his concern for the hazards represented by the cable ferry crossing at South Island. He stated that the cable was the primary hazard and recommended some temporary modifications until such time as the cable could be removed. Among his recommendations were that the guide cable be modified so that it could be lowered to the bottom of the water from both sides of the waterway; that four (4) additional signs be installed with legends clearly indicating the danger of the cable and that passage should not be attempted while the lights on the ferry were flashing; that these signs should be located five hundred (500) feet north and south from the present signs; and that the guide cable be installed in a lower position that would likely result, if it were struck by a boat,

in damage to the vessel's hull but less likelihood of injuries to individuals. He also recommended that the state should consider a self-propelled ferry or at least consider the use of a cable ferry without a guide cable and advised Catoe that ferries of this type were being operated by the State of Louisiana. He further suggested that Catoe contact officials in that state concerning the operation of such ferries.

9. On November 20, 1974, a letter of similar import had been sent by Commander Stewart to the Commander of the Seventh Coast Guard District in Miami, Florida, calling to his attention the dangers presented by the operation of the cable ferry and regarding changes similar to those made in his letter to Catoe.

10. On November 21, 1974, Catoe, by way of memorandum to the State Highway Engineer of the Highway Department, indicated that strobe lights were to be placed on both sides of the waterway to

operate when the ferry was in operation and a switch was to be installed on the mainland side of the waterway to allow the guide cable to be lowered in case it was necessary due to an approaching boat.

11. On December 5, 1974, the State Highway Engineer by way of memo to Catoe approved, among other matters, the installation of the red strobe lights and the switch to allow the lowering of the guide cable from the mainland side of the waterway. Catoe was also instructed to comply with the terms of Commander Stewart's letter dated November 20, 1974, and to also give consideration to the recommendations contained in Commander Stewart's letter of November 21, 1974.

12. On October 9, 1975, suit was filed in the United States District Court, District of South Carolina, Charleston Division, by the Administrator of the estate of John W. Fulton and by Carol Peaga individually against the United States of

America and the South Carolina State Highway Department for damages occasioned by the wrongful death of Fulton and for the injuries sustained by Feaga.

13. On April 1, 1977, the Honorable Sol Blatt, Jr., U.S. District Judge, after concluding the trial of the Fulton and Feaga cases wrote a letter to Paul W. Cobb, Chief Highway Commissioner of the Highway Department and advised him that he felt that the South Island Ferry, even after the addition of safety features which had been installed after the Fulton death, still constituted a dangerous hazard that was likely to result in further death and injury unless a safer crossing method was instituted. He also stated that he thought the situation as it existed at the South Island Ferry crossing was the most dangerous hazard to navigation that could be imagined.

14. On April 6, 1977, the Commander of the Seventh Coast Guard District located in

Miami, Florida, wrote and advised the Marine Inspection Officer in Charleston, South Carolina, this being the same office previously commanded by Commander M. J. Stewart, that their office had been advised that the ferry was often carrying more passengers than permitted by law. In addition the letter advised the Marine Inspection Officer that the duties required of the ferry operator prevented him from keeping a proper lookout. The letter also pointed out that the additional signs requested by Commander Stewart in his letter to the Highway Department dated November 21, 1974, had not been installed.

15. On April 7, 1977, Paul W. Cobb, Chief Highway Commissioner, South Carolina State Highway Department, wrote a reply to Judge Sol Blatt, Jr.'s letter of April 1, 1977, in which he stated that he felt that all feasible safety suggestions relative to the operation of the South Island Ferry had been implemented by his department. He

further indicated that he felt that there were four (4) alternatives available to his department regarding the South Island Ferry. These alternatives were: (1) continue operation of the present ferry with the resulting liability that may be involved; (2) change the present ferry operation to a self-propelled type which would involve a substantial expenditure; (3) construct a bridge for which the Department had no funding or (4) discontinue the ferry operation.

16. On May 16, 1977, the Coast Guard by letter advised Catoe that the operators of the ferry were required by law to maintain a proper lookout during the operation of the ferry and suggested that the ferry operators be furnished a flashlight so that they might be in a position to warn approaching vessels of the cable by being able to illuminate the same.

17. On August 17, 1977, the Corps concluded that it had responsibilities

concerning the operation of the South Island Ferry and that the Corps possessed the authority to control the operation of a cable ferry in navigable waters. The circumstances causing the Corps to reach this conclusion began during the trial of the actions on behalf of Fulton and Feaga during the month of March, 1977.

18. On August 17, 1977, the Acting District Engineer for the Corps based in Atlanta, Georgia, by memorandum advised the District Engineer of the Corps based in Charleston, South Carolina, that ferry cables were subject to regulation by the Corps, citing appropriate legal authorities. In addition the memorandum alluded to the fact that the cable had been found to be dangerous and a hazard to navigation by a Federal District Court and if voluntary removal could not be accomplished the District Office of the Corps in Charleston, South Carolina, was instructed to commence appropriate legal

action consistent with the Federal Court ruling.

19. On September 8, 1977, Col. William W. Brown, District Engineer, Army Corps of Engineers, wrote the Highway Department setting forth the Corps's concern regarding the safety of the South Island Ferry operation. The same letter also requested a meeting of representatives from the Highway Department, Coast Guard and South Carolina Wildlife and Marine Resources Department. The stated purpose of the meeting was for the formulation of a course of action to abate the hazard existing at the South Island Ferry. At this meeting on October 14, 1977, which was attended by representatives of all requested departments, it was stated by the Corps's representative that the ferry was hazardous and that it was only a matter of time before the Corps would have to close it down.

20. On October 18, 1977, the Highway Department acknowledged by way of memorandum that the average number of vehicles per day using the South Island Ferry from October 1976 through September 1977 was 49.6.

21. On October 23, 1977, there was an accident involving the South Island Ferry cable which resulted in injuries to three (3) persons.

22. On October 28, 1977, the Corps, citing the Rivers and Harbors Act of 1899 as its authority, by way of telegram, directed the Highway Department to minimize the number of ferry crossings by allowing crossings only for the compelling needs of the South Island residents and State, local and Federal authorities in the performance of their duties.

23. On November 3, 1977, another meeting was held between representatives of the Corps, Highway Department, Coast Guard and other interested parties. The meeting

ended with the parties agreeing to work towards the elimination of the cable used in the operation of the South Island Ferry.

24. On November 17, 1977, the Highway Department sought approval from the Corps for a ferry schedule which would result in a twenty-five (25%) per cent reduction in the daily number of crossings.

25. On November 18, 1977, the Honorable Sol Blatt, Jr. issued his Order in Doyle v. United States, 441 F.Supp.701, the cases determining the damages arising out of the death of Fulton and out of the injuries to Feaga. The Doyle decision found that the Corps and the Coast Guard were negligent and had abused their discretion in failing to warn boaters of the dangers that existed at the South Island Ferry and in failing to improve the safety of the ferry operation. The decision further held that their conduct was a proximate cause of the collision

between Fulton's boat and the ferry cable which resulted in his death and the injuries to Feaga.

26. On November 22, 1977, the Corps by letter advised the Highway Department that the proposed reduced schedule of ferry crossings was unacceptable. Furthermore, the letter stated that the ferry was to be used as little as possible and to serve the needs of South Island residents only. (Emphasis in original). The Highway Department was also directed to furnish plans by December 2, 1977, to the Corps for the complete removal of the cable ferry. Also, on December 2, 1977, an approved minimal operation schedule was to be in effect.

27. On December 1, 1977, the Highway Department by letter to the Corps confirmed the extension deadline for plans to be formulated for a permanent solution to the South Island Ferry problem from December 2, 1977 to December 5, 1977. The letter

further stated that plans were contemplated for a permanent solution and the Highway Department contemplated the taking of prompt action in regards to a permanent solution.

28. On December 1, 1977, the Highway Department advised the Corps by letter to District Engineer Col. William W. Brown that flagmen would be posted in boats upstream and downstream during the hours of operation of the South Island Ferry. The Highway Department stated these boats would be equipped with flashing lights and electronic public address systems to be used to warn traffic that the ferry was in operation.

29. On December 9, 1977, the Corps by letter of Col. William W. Brown, District Engineer, to the Highway Department, confirmed and approved the schedule of operation as previously submitted by the Highway Department and the use and posting of flagmen as outlined in the Highway

Department's letter of December 1, 1977.

This same letter went on to reiterate the serious concern of the Corps concerning the matter and urged the Highway Department to secure an early removal of the cable.

30. On December 11, 1977, Charles Lonnie Faust (hereinafter referred to as "Faust") was killed when he was struck by the South Island Ferry cable when passing the ferry in his motorboat. On that same date, two passengers in the boat, Tommy Bennett (hereinafter referred to as "Bennett") and Curtis L. Muldrow (hereinafter referred to as "Muldrow") sustained personal injuries as a result of the collision.

31. On December 12, 1977, the day after Faust was killed, the Highway Department's District Engineer was authorized to hire flagmen to operate the advance warning flag boats at the South Island Ferry.

32. Subsequent to December 11, 1977, Highway Department personnel began corresponding with representatives of an engineering firm in connection with the design of a self-propelled ferry. Specifications for the self-propelled ferry were completed in January of 1978 and a bid was let for the construction of the ferry in February of 1978. The self-propelled ferry was put into operation at South Island in April of 1978 at a cost of approximately \$100,000. The total cost of the self-propelled motorized ferry was paid for by the Highway Department out of funds that were on hand prior to December 11, 1977. All of the matters relating to the self-propelled ferry were accomplished by the Highway Department in less than five (5) months after the death of Faust.

B. The Ferry And Its Approaches on  
December 11, 1977

33. The cable ferry in use on December 11, 1977 was operated identically to and

was the same ferry, subject to certain modifications, that was in service on October 9, 1974, the date Fulton was killed when his craft struck the ferry cable.

34. The ferry was capable of transporting two (2) automobiles across the waterway. The water, over which the ferry moved, was subject to the ebb and flow of the tide.

The ferry, as it had been for many years prior to 1974, was stabilized by a 5/8" steel guide cable which was permanently attached to both sides of the waterway. The ferry was manned by only one (1) operator, and when a crossing was necessary, the operator activated an engine located on the "hill" or high ground on the South Island side of the waterway. The activation of the engine, which was located directly behind the ferry mooring, caused the guide cable to become taut and rise to a horizontal position up to four (4) feet

above the water across the entire width of the waterway.

The ferry was fifty (50) feet long, twenty (20) feet wide and weighed some twenty (20) tons. It was propelled by the use of a cable propulsion system which employed an eight horsepower engine to activate a double drum, which in turn pulled the ferry back and forth across the waterway. When the ferry was not in use, its regular station was on the South Island side of the waterway.

The operator's cabin was a wooden structure located in the center and off to the righthand side of the ferry as one viewed it from the mainland side of the waterway. This cabin contained, among other things, a manual throttle for activating the engine. Because of this it was necessary for the operator to remain inside the cabin at all times during the crossing of the waterway.

As the ferry moved from the South Island side to the mainland side of the waterway and from the mainland side to the South Island side of the waterway, the 5/8" steel cable used to stabilize the ferry remained taut and up to four (4) feet across the entire width of the waterway. This cable also remained in the exact same position across the entire width of the waterway at all times while the ferry was moored on the mainland side for the purpose of loading and unloading vehicles. Only upon the return of the ferry to its mooring on the South Island side of the waterway could the guide cable be lowered below the water to allow safe passage of boats.

The guide cable, because of constant exposure to salt water and other elements, was a muddy brown color. It was not capable of being seen at night. Although it would appear to an approaching boater that there was ample water behind the ferry for a vessel to proceed when the ferry was

docked on the mainland side, passage was not possible due to the fact that the guide cable was taut and stretched across the entire width of the waterway.

On a typical trip the guide cable was taut up to four (4) feet above the waterway for a period of time of approximately eight (8) to fifteen (15) minutes.

35. The ferry made approximately thirty (30) crossings per day. A crossing consisted of the time necessary for the operator to activate the engine, to load the vehicles if necessary on the South Island side of the waterway, to cross the waterway, unload the vehicles on the mainland side, and return to South Island. The average crossing time from start to finish lasted from eight (8) to fifteen (15) minutes meaning the waterway was subject to being completely blocked for up to 7.5 hours per day.

36. The markings and warning systems present at the ferry site on December 11,

1977 had changed somewhat since the Fulton death in 1974. The changes were made piecemeal by the various agencies involved and were often made only after there had been an accident between a vessel and the cable.

The so-called advance warning system on December 11, 1977, consisted of four (4) signs which were in actuality twelve (12) signs placed in groups of three (3) per pole in four separate locations. The poles upon which these signs were attached were located on both sides of the waterway with two (2) of them being five hundred (500) feet north of the ferry and two (2) of them being five hundred (500) feet south of the ferry.

The signs and the messages contained therein were identical at all four (4) locations; however, the coloring of the signs, the lettering of the signs and the size of the lettering on the signs varied.

The sign at the top portion of the poles was a 5 m.p.h. speed sign which was approximately 3' X 4'. The legend was white letters and numbers on a red background. Located beneath the speed sign was a sign approximately 5' X 12' which contained on the top portion the word "CAUTION". The color was black letters on a red background. Located below the word "CAUTION" was a message "CABLE OPERATED FERRY 500-FEET AHEAD". This portion of the sign consisted of black letters on a white background. Located just below as part of the same sign was a further message which read "STOP ON RED". This lettering was black on a red background. In addition, there was a smaller sign approximately 2' X 9' located beneath the 5' X 12' sign which read "CABLE ABOVE WATER WHEN FERRY IN OPERATION". This sign consisted of black lettering on a white background.

Each of the four (4) sign locations were designed so that they were

perpendicular to the waterway and the front portion was lighted by two spotlights which remained in operation after dark. In addition, all four (4) sign locations had two (2) red flashing wig-wag lights which were caused to be operational when the ferry was in operation. The two (2) sign locations on the South Island side of the waterway, both North and South of the ferry crossing, had, in addition to the signs and lighting described above, two (2) sirens on the top of the 5' X 12' sign which were activated during the time that the ferry was in operation. In addition, the two (2) sign locations on the South Island side of the waterway each had a red strobe light located adjacent to the sirens on the 5' X 12' sign. The strobe lights were also activated when the ferry was in operation.

The ferry itself had mounted on it five (5) revolving red lights similar to those used on police and fire vehicles. In addition, there was one (1) red strobe

light located atop the 16' mast which was located on the ferry and there was one (1) battery operated siren aboard the ferry. These lights were activated while the ferry was in operation. The siren was activated manually by the operator during such time as he was located inside the operator's cabin. In addition, there were various reflective signs placed about the side of the ferry.

The cable itself was marked by stop signs which have been described as "trailing stop signs". This device consisted of two standard-size South Carolina Highway Department stop signs which were mounted in a wooden frame and located atop the guide cable just behind the ferry itself. The stop signs were not lighted in any manner and were not visible to persons using the waterway in the nighttime. The only difference in the markings on the ferry from 1974 until December 11, 1977, was the "trailing stop

signs" and the fluorescent striped signs placed on the side of the vessel with the legend, "Cable Ferry-Stop on Red".

The operator was not furnished any equipment such as a flashlight or other devices with which to illuminate the cable at night. The operator because of the various duties required of him during crossings was unable to leave the cabin portion of the ferry and the siren located on the ferry was only capable of manual activation. Once the ferry reached the mainland side of the waterway and the operator was in the process of loading and unloading vehicles the siren was inoperative. The ferry landing areas, both on the island side and on the mainland side, were illuminated during periods of darkness with vapor mercury street lamps, such as are found in cities, designed primarily to assist in the loading and unloading of the ferry. These vapor arc lamps, the lights on the ferry, and the

advance warning lights, are visible to a boater from the time he enters the Intracoastal Waterway from Winyah Bay.

37. Regardless of the various changes made at the ferry after the year 1974, the ferry remained a serious threat to life and property and continued to be the cause of numerous accidents on the waterway. The various signs located five hundred (500) feet North and South of the ferry crossing were confusing and misleading and failed to meet all of the guidelines for signs recognized and approved by the Highway Department and other persons with expertise in this area, including Coast Guard personnel. The signs were positioned in the waterway in such a manner that once the boater passed the signs it was impossible to read the message contained on the signs. In addition, the recognized engineering principle of one (1) sign to one (1) location was violated in that three (3) signs were placed in one (1) location.

The signs did very little to apprise a boater unfamiliar with the area of the danger located at the crossing area. The danger itself, the steel cable stretched across the waterway, was insufficiently marked and in no way lighted and both the markings, consisting of the "trailing stop signs" and the cable itself were not capable of being seen in the nighttime.

In addition and more importantly, the revolving lights and the strobe light on the ferry itself served to attract a boater's attention to the ferry and away from the advance warning signs and the cable.

The messages contained at the advance warning sites, when grouped together as they were, five hundred (500) feet North and South of the ferry crossing, were misleading and confusing. The top sign indicated that the boater should travel 5 m.p.h. The middle sign indicated to the boater that there was a cable ferry

operated ahead and that he should stop his boat on red but did not indicate where he should stop. The bottom sign indicated that there was a cable across the waterway when the ferry was in operation. This sign failed to tell the boater that when the ferry was on the mainland side and in the process of loading or unloading vehicles that it was still in operation although it was no longer traversing the waterway.

It would appear to a boater in the nighttime after his attention had been attracted to the ferry by its flashing lights that a ferry located hard on the bank on the mainland side in the process of loading or unloading vehicles was no longer in operation and that the cable alluded to in the signs was no longer across the waterway.

The various colors used on the three (3) signs at each of the four (4) sign locations and the messages contained on the signs competed against one another for a

boater's attention. In addition, the black lettering on the red background on the middle sign was not capable of being seen as easily as other portions of the sign by a boater in the nighttime. Although it is undisputed that the cable was a hazard and a danger to a boater using the waterway, none of the signs at any of the locations used the word "danger" when the use of such a word would have given a boater a clearer indication as to what existed in the waterway just five hundred (500) feet from the sign.

It is an accepted principle in the posting of signs that the greater the danger the greater the responsibility to mark the danger. There was nothing in the South Island area that would allow a boater at night, who was unfamiliar with the area, to visibly or otherwise ascertain the existence of a steel cable stretched across the waterway, inasmuch as the cable was in

sirens at the sign locations were activated; however, they were incapable of being heard from a boat traveling at the speed the Faust boat was traveling. The siren on the ferry, which was previously sounded by the operator during the crossing, was no longer operational since the ferry had completed the crossing and the operator had exited the operator's cabin and was removing a chain to allow an automobile to leave the ferry. Although the operator ran from his position on the mainland to the ferry cabin in order to manually sound the siren located on the ferry, the testimony is that the sounding of the siren and the collision itself were simultaneous.

The tide at the time was rising and would have been high at approximately 9:30 P.M. The weather was cold and it was dark and clear at the time of the collision.

Regardless of the speed of the Faust boat, and the testimony concerning the

no way marked so as to be visible in the nighttime.

C. Accident And Injuries

38. The deceased, Faust, and two of his friends, Bennett and Muldrow left Florence, South Carolina, during the morning part of December 11, 1977, for the purpose of fishing in Winyah Bay located near Georgetown, South Carolina.

The three (3) men arrived in the City of Georgetown just before noon and after purchasing bait and getting directions to a landing they launched their craft, which was an eighteen (18) foot West-Bend inboard/outboard motorboat owned by Faust, shortly after noon. The boat was launched from a public boat landing located in the City of Georgetown.

All of the men were unfamiliar with the Winyah Bay area. Faust and Bennett had been in the area once before; however, their fishing on that occasion was done

from an abandoned bridge. None of the men had ever done any boating in salt water.

Shortly after leaving the landing the men came upon a disabled boat occupied by Henry H. Hendricks (hereinafter referred to as "Hendricks"), a resident of the Georgetown area. There was a conversation concerning the trouble with his boat and then a later conversation concerning fishing conditions in the area. After a short period of time Hendricks agreed to join the men in their boat and to take them to an area where they might be able to catch some fish. The men then traveled to an area near Debordieu Beach and fished during the afternoon. After completing the fishing they then went to an area to gather oysters and then went back to crab pots owned by Hendricks and removed some crabs. As darkness approached they headed back to the area where Hendricks had left his boat and thereafter Faust towed the Hendricks boat to an area known as Campbell's

Landing. Since darkness was fast approaching and the boaters were unfamiliar with the area they asked Hendricks for directions back to the landing. The men did not specify which landing they were seeking and inasmuch as the South Island landing was a popular public boat landing and since they had initially come from that direction, Hendricks incorrectly assumed that they had put in from South Island landing. He gave them directions back to South Island landing which was located in an area near Campbell's Landing.

39. Shortly after leaving Campbell's Landing, at approximately 6:10 P.M., the boat being piloted by Faust, exited from Winyah Bay as per the instructions of Hendricks and headed South down the Intracoastal Waterway, more particularly, the Estherville-Minim Creek Canal. It was in this canal that the South Island Ferry was located.

Once reaching the Intracoastal Waterway the boat was driven by Faust at a speed between 15 and 25 m.p.h. Faust was positioned such that he was sitting on his feet with his head above the windshield. Immediately to his side was Bennett who was standing so that his head was also above the windshield. Muldrow was seated facing backwards in a seat located just behind Faust. The boat traveled in the middle of the waterway as it approached the area in which the cable ferry was located.

As the Faust boat approached the cable ferry, the ferry was hard on the mainland side and the operator was in the process of unloading an automobile at the time of the accident. The guide cable was taut and spanned the complete width of the canal which was approximately three hundred (300) feet. The lights were in operation on the ferry itself and the sign locations five hundred (500) feet North and South of the cable crossing were illuminated. The

speed varying from 15 m.p.h. to 25 m.p.h., the occupants of the boat would only have had a matter of seconds within which to read, interpret, comprehend, and obey the messages located on the advance sign locations. After passing the sign locations, the collision with the cable would have occurred within a matter of seconds.

39. The passenger, Muldrow, seated facing the rear of the boat, did not see any of the advanced signs nor did he see the ferry nor hear any sirens until the time of the collision. The passenger, Bennett, saw what he describes as a blur of light which occurred just prior to the collision. The speed of the boat did not vary nor did the boat veer from its course down the center of the waterway from the time it entered the waterway until the time it struck the cable. There is no evidence that Faust ever saw the cable stretched taut across the waterway behind the ferry.

40. At the time of the impact the bow of the boat passed under the cable which would have been an approximate height of four (4) feet. The cable struck the windshield of the boat and Bennett, who had been standing next to Faust, was thrown from the boat. Faust was hurled backwards and down onto the bottom of the boat suffering severe neck and head injuries resulting in his immediate death. Muldrow was thrown about in the boat.

41. Faust endured no pain and suffering prior to death. At the time of his death on December 11, 1977, Faust was forty (40) years of age and had an additional 34.05 years of life expectancy and a work-life expectancy of 23.05 years. He was survived by four (4) dependents, his wife, age 37 at the time of his death, and three minor children, ages 5 1/2, 8 1/2 and 11 1/2 at the time of his death. Faust enjoyed a loving family relationship with his wife and children. He was graduated

from Voorhees College, South Carolina State College and received additional training from Denmark Technical Education Center, Florence-Darlington Technical Education Center and Francis Marion College. At the time of his death he held a Master's degree in the field of teaching and had been employed by the Florence Public School District One as a teacher for a number of years.

At the trial of this matter the plaintiff, Faust, and the defendant, United States of America, both presented economic experts as to the financial losses incurred as a result of the death of Faust. Both experts testified from a series of charts, graphs and work figures that they had compiled and these were received by the Court and have been examined in detail. Both of the experts confined their testimony and findings to the loss of financial contributions and home services resulting from the death of Faust. I find

that the approach and figure used by the plaintiff's expert witness, namely, Dr. Oliver G. Wood, Jr., is a more practical approach to the problem and adopt his findings as to the economic loss suffered by the Faust family. The Court would note that the discount rate and the method of computing the present value of the total financial loss used by Dr. Oliver G. Wood, Jr. has been used and accepted by the United States District Courts. Doyle v. United States, 441 F.Supp.701 (D.S.C.1977).

[1] Faust, who was age 40 at the time of his death, had an additional work-life expectancy of 23.05 years. Dr. Oliver G. Wood, Jr., Ph.D., an actuarial expert, has opined that the before trial loss in gross earnings which includes the period from the date of the death until the trial is \$64,404. Upon reducing his earning capacity to adjust for his contribution to the retirement system, taxes and personal

consumption, the before trial loss in net earnings is \$34,752. The opinion of the expert was that the present value of the after-trial loss and net earning capacity, as well as retirement income, is \$194,360. This figure includes adjustment for retirement contributions, taxes and personal consumption.

Furthermore, Faust spent a minimum of ten (10) hours per week providing numerous domestic services for his family, including but not limited to: caring for the lawn, upkeep on the house, repairing and maintaining the family automobile and home appliances, providing transportation for the children, and financial management for family affairs. Valuing these services at the federal minimum wage rate plus the employer Social Security payments in the after-trial period results in a pre-trial loss in family services amounting to \$6,091. Similarly, the computation for the

after-trial loss of family services computed to \$52,643.

The total before and after-trial loss by virtue of loss of earning capacity and family services reduced to their present value as computed from the figures set forth above totals \$287,846.

In addition, Faust's combined funeral expenses representing an out-of-pocket expense to the Faust family totals \$2,481.00, bring the total economic loss to \$290,327.

[2] Faust was a devoted and loving father and husband. He returned to his home promptly after completion of his work-day at the high school and upon reaching home spent his time with his wife and in particular the three young children in the home. The wife and children were included on weekend activities which, among other things, consisted of visits to various family members located within the state. He was active in his church with his family

and served in a number of capacities dealing with church work. He also conducted family devotions in the home which among other things consisted of a frequent reading from the Bible. He assisted his children with their homework, played games with them, took them on family picnics and outings, took them fishing and counseled with them concerning their everyday problems. A majority of his non-working time was spent with his wife and children and a great deal of that time was spent nurturing, training, educating and guiding his three (3) young children. As a result of his wrongful death, they have been deprived of these services. I am of the opinion that the children are entitled to recover for this loss. In evaluating these services, they do not lend themselves to mathematical exactness. It

is, however, my opinion that One  
Thousand Five Hundred and No/100  
(\$1,500.00) Dollars per year per child  
until each child reaches age twenty-five  
(25)<sup>1</sup> should be recovered for each  
surviving child for this loss. This item,  
calculated for all three (3) children, is  
Fifty-Eight Thousand Seven Hundred  
Forty-Two and No/100 (\$58,742.00)  
Dollars.<sup>2</sup>

<sup>1</sup> In my opinion, children rely on their  
fathers for nurture, guidance and training  
until at least twenty-five (25) years and  
in many instances throughout their parents'  
lives.

<sup>2</sup> Antonious, 5 1/2 years old, is entitled  
to recover for a total of 19.5 years as  
follows: 4 years pre-trial recovery of  
\$6,000 and 15.5 years after-trial recovery,  
discounted at the rate of 5%, of  
\$15,917.00, for a total of \$21,917.00.

Shongra, 8 1/2 years old, is entitled to  
recover for a total of 16.5 years as  
follows: 4 years pre-trial recovery of  
\$6,000 and 12.5 years after-trial recovery,  
discounted at the rate of 5%, of  
\$13,697.00, for a total of \$19,697.00

Darlean, 11 1/2 years old, is entitled to  
recover for a total of 13.5 years as  
follows: 4 years pre-trial recovery of  
\$6,000 and 9.5 years after-trial recovery,  
discounted at the rate of 5%, of  
\$11,128.00, for a total of \$17,128.00.

During the entire course of the marriage Faust provided his wife and children with love and affection, and in addition, provided care, attention, companionship, comfort and protection for them. The deprivation of these "society" benefits by his wrongful death has resulted in a grave loss to her and the three (3) children.

Faust and his wife were a close and loving couple and the marriage had never been subject to any periods of separation and at the present time Mrs. Faust is unmarried and has been so since the date of her husband's death.

(3,4) In my opinion each child is entitled to an award which I find to be Thirty Thousand and No/100 (\$30,000.00) Dollars per child for a total of Ninety Thousand and No/100 (\$90,000.00) Dollars for the three (3) children, for this loss of companionship; and I am of the opinion

that the widow, Alean Hester Faust, is entitled to an award of Sixty Thousand and No/100 (\$60,000.00) Dollars for such loss. Therefore, plaintiff is entitled to recover, both on her behalf as widow and on behalf of her children, the sum of One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars.

42. At and prior to the collision between the Faust boat and the taut cable, the plaintiff Curtis L. Muldrow was seated in the rear of the boat facing aft behind the driver. On impact Muldrow was rendered unconscious. After the boat passed under the cable and began circling in the waterway, Muldrow regained consciousness, staggered to the front of the boat and turned the throttle off. Some boatsmen in another boat came alongside and carried him to the landing on the mainland side where he stayed in the cab of a truck to keep warm until the ambulance arrived in about a half hour. He and his injured companion,

Thomas Bennett, were transported by ambulance to the Georgetown Memorial Hospital for treatment of their injuries. Later that evening, following x-rays, Muldrow was released and returned to his home in Florence. On December 12, 1977, he awoke in pain and was examined by his physician, S. A. Greenberg, M.D., who diagnosed his injuries as a cerebral concussion, multiple contusions of the head and shoulders, cervical and thoracic sprain, a subconjunctival hemorrhage of the right eye, depressive reaction with post-concussion syndrome. The following day he was admitted to the Florence General Hospital for x-rays, physiotherapy and treatment and released on December 19, 1977. He continued under Dr. Greenberg's care on follow-up visits for headaches and pain and distress in the cervical and lower back until March 30, 1978. Due to persistent headaches he was referred for neurological evaluation of the post-

traumatic headaches to Dr. S. C. Soni, M.D., at the Medical University of South Carolina Hospital, Charleston, South Carolina, on April 5, 1978, and received a negative neurological report.

On May 3, 1978, due to persistent headaches and pain in the cervical area of his spinal column, he was examined and x-rayed by an orthopedic specialist, A. Cecil Bozard, M.D., Florence, South Carolina, which disclosed a displaced fracture of the tip of the spinous process of the second cervical vertebra. A home traction device was prescribed, along with a Jackson pillow to support the weight of his head and neck during sleep. He was seen on follow-up visits and discharged on May 11, 1978, as being incapable of returning to work, and having the potentiality of permanent cervical disc injury. A lumbar corset or support was prescribed for his lower back distress.

On August 28, 1980, he was evaluated orthopedically by Edward E. Kimbrough, M.D. of the Moore Clinic, in Columbia, South Carolina. X-rays revealed an old displaced avulsion fracture of the tip of the spinous process of C-2 vertebra and a spondylolysis of the 5th lumbar vertebra. Due to continued symptoms of neck pain and some low back pain, Muldrow was rated at having a 20% permanent impairment of the cervical spine and a 10% impairment of the lumbar spine as a result of injuries sustained in the accident.

On November 13, 1981, Muldrow was given an up-to-date orthopedic evaluation by Harry C. Taylor, M.D., Georgetown, South Carolina, who rated Muldrow as having sustained a 20% permanent disability of the cervical spine and a 25% permanent disability of the lumbar sacral spine, in view of current symptoms despite the lapse of time.

At the time of the accident Muldrow was 26 years old, was working as a debit insurance agent with Interstate Life Insurance Company, Florence, South Carolina, and earning \$1,200 a month, base pay plus commission. He was unable to return to work until January, 1978; however, upon his return he could not perform his debit work which required driving a car and getting in and out of the vehicle. He continued his work in the office with no loss of pay, until he resigned in March, 1978, because of his inability to do the work due to headaches and dizziness; thereafter, he sought relief from his physician.

Prior to entering the life insurance business, Muldrow was a mechanic by trade. He attempted to return to work as an automobile mechanic, but could not do so on account of his injuries. Since November of 1978 he has been working parttime as a mechanic and truck driver making \$400 a

month. In addition, he is unable to resume his previously enjoyed athletic activities. His medical expenses, exclusive of his hospitalization in the Florence Memorial Hospital, the amount of which no evidence was presented, amounted to \$340.

(5) Muldrow sustained painful injuries in the accident consisting of a cerebral concussion, multiple bruises and contusions, cervical and thoracic sprains, conjunctival hemorrhage of the right eye, a fracture of the spinous process of C-2 vertebra, a severe lumbo sacral sprain and right sciatic neuritis. The cervical and lumbar symptoms have persisted and he has sustained a 20% permanent partial disability of the cervical spine and a 25% permanent partial disability of the lumbo sacral spine, which has affected his ability to perform heavy work or the usual duties of an automobile mechanic such as lifting, working under motor vehicles, or other physical motions, as he was able to do

prior to the accident without difficulty. I find that he is entitled to be properly compensated for his pain, suffering, damages and permanent partial disability, before and after trial, and taking into consideration future pain and suffering and discomfort, and reducing that amount to its present cash value by use of a discount rate of five (5%) percent, which this court feels is reasonable and fair, in the sum of Eighteen Thousand and No/100 (\$18,000.00) Dollars.

(6) 43. At and prior to the collision between the motorboat and the taut cable, the plaintiff Thomas Bennett, age 34, was standing in the front of the boat behind the windshield facing forward and to the left of the driver. On impact the windshield was shattered and Bennett was struck in the chest by the cable and was thrown overboard. Some boatmen in another boat rescued him when he came to the surface and he was carried to the landing

on the mainland side of the waterway, where he stayed in the cab of a truck to keep warm until an ambulance arrived in about a half hour. He and his companion, Curtis L. Muldrow, were transported by ambulance to the Georgetown Memorial Hospital for treatment of their injuries. Later that evening following x-rays, Bennett was released and returned to his home in Florence, South Carolina.

On December 12, 1977, he awoke in great pain and was examined by his physician, R. L. Skinner, Jr., M.D., who diagnosed his injuries as contusions of the anterior chest wall and a costocondral separation of his chest or rib cage below his neck. He was prescribed drugs for pain and was unable to return to work until January 15, 1978, due to his injuries. At the time of the accident he was performing heavy work, which required the use of his arms, shoulders and back and strain on his chest and rib cage at the Electro-Motive

Plant in Florence, where he grossed \$500 a month on the day shift. At the time of the accident he was also working and performing heavy labor at the La-Z-Boy Chair plant in Florence, where he grossed \$500 a month on the night shift. He continued under the care of Dr. Skinner until January 11, 1978, when he was discharged without any disabling symptoms. His medical expenses for treatment at Georgetown Memorial Hospital, \$77.00, x-rays at McLeod Memorial Hospital, \$41.00, amounted to \$118.00. On November 13, 1981, Bennett was examined by Harry C. Taylor, M.D., Georgetown, South Carolina, at which current examination Dr. Taylor found that he had fully recovered from his injuries with no disability or permanent impairment.

Bennett sustained a painful injury of his separated rib cage, which temporarily disabled him for a period of five weeks from engaging in his customary or normal activities and performing his job and loss

of wages for that period of time. I find that he is entitled to be properly compensated for his pain, suffering, damages and temporary total disability in the sum of Five Thousand and No/100 (\$5,000.00) Dollars as a result of the accident.

D. Responsibility and Fault

44. During its years of operation, the South Island Ferry has been subject to statutes, rule, regulations and guidelines set forth by the United States of America and the State of South Carolina. These have been implemented by various agencies of the United States of American and the State of South Carolina. The degree of involvement by these two entities has varied from time to time but since the year 1974 both have become active in their involvement with the South Island Ferry and in particular with the safety aspects surrounding the operation of the ferry.

Both entities have had full knowledge of the many accidents involved at the ferry crossing site and all were particularly aware of the 1974 accident which resulted in the death of Fulton.

Both the Highway Department and the United States of America were sued in the United States Federal District Court concerning the Fulton death.

The Highway Department has been actively engaged in the operation of the South Island Ferry since the incorporation of that ferry site into the South Carolina Highway system in the year 1940. The Highway Department during the years 1971 to 1975 investigated at least seven accidents involving collisions between boat and the cable and forwarded copies of their reports to their Coast Guard, an agency of the United States of America.

The Highway Department by letter of November 21, 1974, shortly after the Fulton death, was put on notice of the Coast

Guard's concern for the hazards presented by the cable and were advised that the cable should be modified so as to be lowered from both sides of the waterway and that four (4) additional signs with legends clearly indicating the danger of the cable should be erected. Neither of these directives were complied with by the Highway Department nor was there any effort as requested by the Coast Guard to lower the guide cable's position above the waterway so as to cause less likelihood of injuries to individuals.

At the completion of the trial of the case involving the death of Fulton, the Chief Highway Commissioner received a letter dated April 1, 1977, from the Honorable Sol Blatt, Jr., trier of the facts in the matter involving the death of Fulton, who advised that even after the additional safety features had been added the ferry crossing constituted a dangerous hazard and was likely to result in further

death and injury. In replying to this letter, the Chief Highway Commissioner set forth a number of alternatives available to the Highway Department and among those was the decision to "continue operation of the present ferry, with the resulting liability that might be involved."

After the Corps decided that it had an area of responsibility in this matter the Highway Department was advised on October 14, 1977, that corrective measures had to be taken or the Corps would close the ferry down. Again nothing was done by the Highway Department until an additional accident took place on October 23, 1977.

Five (5) days after that accident the Highway Department was advised to minimize its crossings as directed by a telegram of the Corps forwarded to the Chief Highway Commissioner. Nothing was done to comply with this directive by the Highway Department.

Although the Highway Department indicated during the latter part of the year 1977 that warning boats would be placed in the area with public address systems to be used to warn approaching boaters of the danger, nothing was done in this regard prior to December 11, 1977.

(7) There were some changes made by the Highway Department to add extra signs concerning the presence and danger of the ferry crossing and there were some additional sirens and flashing lights added at the signs posted five hundred (500) feet North and South of the cable crossing and while these may have been some improvements lessening the dangers existing at the site, they were obviously insufficient. The signs as they existed on December 11, 1977, were confusing and misleading. The signs did not comply with the five (5) elements recognized by engineers in this field necessary to adequately mark a hazard or danger. These elements were recognized as

the controlling elements in this area by the expert witness offered at trial by the Coast Guard. In addition, these elements are set forth in the South Carolina Highway Department manual used by their engineers for the designing, placement and erection of signs within the State of South Carolina.

The signs were insufficient to meet the required need due to the danger that existed and incorrectly attracted the attention away from the real hazard, the cable stretched across the waterway. The signs were not simple in their meanings and were not designed to gain the respect of the reader. In addition, the signs were placed so that a boater did not have adequate time within which to respond to the message printed on the signs. In addition, the messages on the signs were misleading and confusing and incapable of being adequately seen due to improper lettering, coloring and markings.

Even though the Highway Department knew and had been advised on numerous occasions by the Corps and the Coast Guard that the cable itself was the hazard, they failed to properly mark the cable and their failure to do so, combined with their failure to properly mark the area, clearly shows a callous disregard for human life.

The continuing failure of the Highway Department to remove the cable after approximately forty (40) accidents involving the ferry and individuals between the year 1965 and 1975, including the death of Fulton in 1974, shows a clear indication of its failure to take sufficient steps to remove what was described by the Honorable Sol Blatt, Jr. as "the most dangerous hazard to navigation that can be imagined."

The Highway Department could have merely lowered the cable as directed by the Coast Guard which would have probably prevented the death of Faust and the

injuries to Bennett and Muldrow.

Similarly, had they put into operation the use of the boats with the public address warning systems as they stated they had done to the Corps, the likelihood of Faust's death and the injuries to Bennett and Muldrow would have been substantially diminished.

The Highway Department in its efforts to mark the site in lieu of marking the hazard itself, i.e. the cable, only added confusion to the matter. The lights as they were placed at the sign locations and atop the ferry competed with one another for attention and the lights on the ferry drew a boater's attention to that vessel and away from the warning signs and the hazard itself, the cable. The number and placement of the lights resulted in what has been described as a "maze" of lights.

The Highway Department on a number of occasions was directed by the Corps to revise the operational hours of the ferry

and to put a limitation on the use of the ferry. The corps first directed on October 28, 1977, that the operation of the ferry was to be restricted to the compelling needs of the South Island residents and those county, state and federal government personnel whose presence on the island was necessary for the performance of their duties. This directive was not heeded by the Highway Department. On November 22, 1977, the Corps directed the Highway Department to schedule minimal operation of the ferry to serve the needs of the South Island residents only. This was not done by the Highway Department. Either of these restrictive uses of the ferry would have resulted in the waterway being blocked for shorter periods of time. At the time of the death of Faust and the injuries to Bennett and Muldrow, the ferry was being used by anyone who presented himself to the operator and, in fact, there were non-

residents on the island at the time of the collision who had been hunting on the island and who were waiting to return to the mainland side.

The Highway Department had full knowledge of the danger that existed and it appears that it had adequate funding and know-how to solve the problem. This is evidenced by the fact that a self-propelled non-cable ferry was designed, built, and put into operation within five (5) months after the initial inquiry about such a craft was made by the Highway Department during the latter part of December, 1977. It is also of importance that the money used to fund the self-propelled ferry was available and on hand during the budget year of 1977 and a special appropriation was not necessary in order to fund this change.

(8) The failure of the Highway Department to have implemented any plans prior to the death of Faust and injuries

to Bennett and Muldrow for removing the cable and the continued failure of the Highway Department to follow directives issued to it by the United States of America concerning the safety of the cable crossing and the ultimate removal of the cable was negligence and contributed to the proximate cause of the death of Faust and the injuries to Bennett and Muldrow.

45. Although the United States of America had nothing to do with the ownership or maintenance of the ferry itself, this entity was certainly charged by law with various responsibilities and duties concerning the cable ferry inasmuch as it operated in the navigable waterways of the United States of America. It is evident by their actions and conduct that the United States of America knew of the ferry's existence and of the hazards to navigation that it presented.

46. The Coast Guard personnel used the ferry on a regular basis. Coast Guard

personnel as early as 1974 had corresponded with the Highway Department and directed that various safety measures be taken concerning the ferry and were specific in what action was to be taken. The recommendations, however, of the Coast Guard were clearly insufficient to mark the hazard that existed and nothing was done by the Coast Guard to follow up on the 1974 directives to establish whether or not these matters had been complied with by the Highway Department. Even internal memorandums from the Commander of the Seventh Coast Guard District to the local office located in Charleston concerning the implementation of directives to the Highway Department set forth as early as 1974 were ignored by the Coast Guard.

Although the Coast Guard was aware as early as 1974 that the only solution to this problem was a complete removal of the cable itself, the ferry was continuously allowed to be operated without proper

marking of the cable hazard. Even though the Coast Guard received numerous accident reports concerning the ferry, they did nothing other than correspond with the Highway Department concerning this matter with the exception of the posting of a 5 m.p.h. speed zone sign in the area. The Coast Guard failed to comply with the prevailing engineering principles concerning the posting of speed limit signs. The sign as erected at the ferry site was placed in an unusual location and in such position that a boater would not expect a speed sign to be posted in this manner.

Although it is charged with the markings of obstructions in the waterway, the posting of aids to navigation, and the approval of private aids to navigation, the Coast Guard at no time followed up on its directives to the Highway Department to assure that the directives made by it to the Highway Department had been complied

with and at no time took any steps to mark the steel cable, which was clearly a hazard and an obstruction to the waterway at the South Island Ferry crossing.

It is apparent from the testimony that the signs located at the ferry crossing site as well as the lights and other warning devices erected there were aids to navigation and, as such, subject to the approval and control of the Coast Guard. Because of their knowledge of the danger as it existed the Coast Guard should have undertaken to require the Highway Department to comply with their directives in erecting proper signs and warnings concerning the hazard. Upon the failure of the Highway Department to act, it was incumbent upon the Coast Guard to erect their own signs so as to adequately mark the hazard and give warning to the boating public of the danger that existed in the Intracoastal Waterway.

(9) The inaction of the Coast Guard to properly mark the obstruction in navigable waterways, combined with their failure to determine if the same had been properly marked as per their directives to the owner of the obstruction, constituted an irresponsible error in judgment and was an abuse of discretion and negligence. This failure on the part of the Coast Guard was a proximate cause of the death of Faust and the injuries to Bennett and Muldrow.

47. The Corps, who has jurisdiction over the South Island Ferry crossing site and who is charged with the responsibility of removing obstructions to navigation in the navigable waterways of the United States of America, did nothing to exercise its authority to remove the existing hazard to the Intracoastal Waterway. The Corps was aware as early as 1974 that there was a serious question as to the agencies responsible for the safe operation of the South Island Ferry. Although it had this

knowledge for a number of years, it appears that the Corps first began to explore their realm of responsibility only during the trial of the Fulton case in March of 1977. After some delay a determination was made in August of 1977 that it did have responsibilities and duties in this area. Only at this point did any member of the Corps take any steps towards improving the safety of the ferry and formulating a plan for the removal of the cable itself. Although a number of meetings were held, nothing was done by the Corps to exercise its authority to close the operation of the ferry until the hazard of the cable could be removed. In addition, although promises were made by the Highway Department concerning the addition of safety features to the area such as boaters with public address systems to warn approaching boaters, nothing was done by the Corps to determine that these safety features had been undertaken and, in fact, they had not been put into operation.

This could have easily been determined by the Corps had it followed through on its responsibilities under law. In addition, although the Corps set deadlines for the Highway Department to produce plans which would result in the removal of the cable, the Corps took no action concerning its directives and deadlines when they went unheeded by the Highway Department.

Although the Corps directed a limitation of the use of the ferry by its telegram of October 28, 1977, to the Highway Department and by its letter of November 22, 1977 to the Highway Department, the Corps never received any proper responses to these directives from the Highway Department. The Corps upon failure to receive proper response should have moved immediately to close the operation of the cable operated ferry at South Island.

In addition, when the Corps failed to receive definitive plans as to a permanent

solution to the removal of the cable at South Island Ferry on December 5, 1977, it should have moved immediately to close the operation of the South Island Ferry crossing.

The only explanation proffered by the Corps concerning its inaction was that they regarded this matter a "sensitive area" inasmuch as a state entity was involved with the obstruction in the waterway. This treatment of the problem in this fashion caused an untimely delay on the part of the Corps in acting to assure the removal of the obstruction and the safe passage of boaters upon the Intracoastal Waterway.

(10) This failure of the Corps to follow through on the directives issued to the State of South Carolina and the failure of the Corps to stop the complete operation of the ferry until the hazardous condition, i.e. the cable, was removed was an abuse of their discretion and constituted negligence on the part of the Corps both of which were

proximate causes of the death of Faust and the injuries to Bennett and Muldrow.

48. The failure of the United States of America by its agencies, the United States Coast Guard and the U.S. Army Corps of Engineers, to exercise due care for the rights of the boating public when both agencies had full knowledge of the real dangers to navigation existing at the South Island Ferry was not only an irresponsible error in judgment but also an abuse of discretion and negligence. The failure of these agencies to act appropriately was a proximate cause of the Faust death.

(11) 49. In apportioning fault between the Highway Department and the United States, I find the parties to be equally at fault.

(12) 50. The speed and manner in which Faust operated his boat was prudent and reasonable under the circumstances and played no role in the causing of the accident. The passengers, Bennett and

Muldrow, likewise conducted themselves in a reasonable and prudent manner and are not chargeable with any negligence or fault which contributed to the cause of the collision.

(13) 51. Faust was not an experienced boatsman in the operation of boats in salt water. He, like many others using this area, was a recreational boater concerned primarily with the use of his craft for pleasure. He did not have on board nor consult any up-to-date charts of the inland waterway system published by the United States Coast and Geodetic Survey. It does not appear that he had access to the government publication designated as Coast Pilot which contained certain information concerning the South Island site.

There was no requirement under Coast Guard regulations for a boat of this size to have on board charts nor any other navigational aids of a similar nature. It is not to be expected that pleasure boats-

men would ordinarily have such charts and information on board. The failure of Faust to have such information on board played no role in the causing of the accident.

(14) 52. Although there was testimony of consumption of alcohol by the occupants of the boat during the course of the day, there was no testimony that the alcohol consumed in any manner affected Faust nor the passengers nor in any way contributed to the accident. The testimony was overwhelming that Faust was in no way impaired as a result of his consumption of an alcoholic beverage and, in fact, the testimony was that his operation of the boat was consistent with that of a person who was not under the influence of alcohol.

Testimony was that the speech of Faust was not slurred or in any manner impaired nor was there any evidence of body impairment caused by the consumption of alcohol. It appears from the testimony

that he, while towing the Hendricks boat, piloted his vessel in a prudent and proper manner to a dock for unloading of the Hendricks boat; that he thereafter followed the directions given him by Hendricks to return to the landing. It appears that he turned at the proper marking in the channel as directed by Hendricks and that once his boat entered the Intracoastal Waterway it remained in the center of the channel at the same speed. The boat in no way veered nor were there any erratic movements of the boat to evidence it was being operated by a person under the influence of alcohol.

Likewise, there was no testimony of any erratic behavior on the part of the persons in the boat at any time during the course of their day in and near Winyah Bay.

Therefore, this court specifically finds that the consumption of any alcoholic beverage aboard the Faust boat was in no way the proximate cause or contributing proximate cause of the collision.

Based on the aforesaid findings, this Court has concluded that the cable ferry located at the South Island crossing on December 11, 1977, constituted an extremely dangerous trap to unwary boaters. The hazard and danger as it existed was evident to all persons and agencies familiar with its operation. The warning signs, lights and other devices were insufficient to apprise a boater of the danger which he faced when the cable ferry was in use.

## II-CONCLUSIONS OF LAW

### A. As to the Highway Department

#### 1. Jurisdiction, Sovereign Immunity and the Eleventh Amendment

Subject matter jurisdiction in this matter is found in 28 U.S.C.A. §1333 which confers subject matter jurisdiction on the District Court over any civil case of admiralty or maritime jurisdiction. This Court, pursuant to 46 U.S.C.A. §742, has venue of these matters.

Furthermore, the activity complained of resulting in the death of Faust and the injuries to Bennett and Muldrow have the proper maritime nexus and are appropriately brought under general maritime law. See, Sea Land Services v. Gaudet, 414 U.S. 573, 94 S.Ct.806, 39 L.Ed.2d 9 (1973); Moragne v. United States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1969); Whittington v. Sewer Construction Co., Inc., 541 F.2d 427 (4th Cir. 1976).

(15-17) It is uncontested that the Highway Department is an alter ego of the State of South Carolina; thus the question becomes whether the Highway Department is in this instance entitled to its Eleventh Amendment immunity or whether this immunity has been waived. The case of Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 404 F.2d 1001 (4th Cir. 1968) relying upon Parden v. Terminal R. Co. of Ala., 377 U.S. 184, 196, 84 S.Ct. 1207, 1215 12 L.Ed.2d 233 (1964), rehearing denied, 377 U.S.

1010, 84 S.Ct. 1903, 12 L.Ed.2d 1057 (1964), establishes that when a state leaves the sphere that is exclusively its own and enters into activities that are subject to congressional regulation, the state subjects itself to that regulation as fully as if it were a private person or corporation. Under Lauritzen, it is well established in this circuit that a state waives its right to immunity and consents to suit if it knowingly and directly enters a field which is subject to the constitutional powers and regulations of the federal government. In the instant case, it is clear that the South Island Ferry was owned and operated by the Highway Department pursuant to a specific state statute, now embodied in Section 57-15-140 of the 1976 Code of Laws of South Carolina, as amended, and that it operates on the Intracoastal Waterway, a navigable body of water subject to federal regulation.

Clearly, the involvement of the Highway Department in regards to operation of the South Island Ferry satisfies the test of Lauritzen and Parden and the Highway Department must be found to have waived its Eleventh Amendment immunity.

The Highway Department, however, contends that the recent case of State of California v. Sierra Club, 451 U.S.278, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981) overruled the aforesaid, Lauritzen and Parden cases by declaring, in essence, that section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) does not provide for a private remedy. This interpretation of Sierra is incorrect.

The Sierra decision was not an admiralty case. It dealt with a very narrow section of the Rivers and Harbors Act of 1899 and merely held that under 33 U.S.C.A. §403 (referred to in Sierra as section 10 of the Rivers and Harbors Act of 1899) a private party may not bring an

action on behalf of those allegedly injured by statutory violations. The action now before this court for the death of Faust and injuries to Bennett and Muldrow is in no way based solely on 33 U.S.C.A. §403 nor any other particular section of the Rivers and Harbors Act of 1899. This action is instead grounded on various other federal statutes and case law which creates liability in the United States of America and its agents as well as the State of South Carolina. It is also based upon the common law applicable to general maritime law regarding death and injury to persons on navigable waterways.

Moreover, the Highway Department's interpretation of Sierra is incorrect in that a reading of that case reveals that it only provides that section 10 does not create a private "right of enforcement remedy." Sierra in no way affects or alters the longstanding rule of a private remedy for "damages." Furthermore, Sierra

does not in any way deal with nor touch upon the Eleventh Amendment. Therefore, the rulings regarding the Eleventh Amendment as contained in Lauritzen and Parden are still controlling in this circuit, and the Highway Department is subject to the jurisdiction of this court.

Thus, once the waiver has been effected by the state as in the present action, a plaintiff may use such statutory and common law available to him to set forth his cause of action against the state as he would against a private person or corporation. These statutory and common law remedies available in this action are set forth hereinafter.

## 2. Theory of Liability

(a) Meeting the test of jurisdiction, the issue then becomes whether the Highway Department is liable under any of the several theories of liability proposed by the plaintiffs. The primary theories espoused by the plaintiffs are as follows:

(1) That the Highway Department violated provisions enumerated under 33 U.S.C.A. §403, et seq., commonly referred to as the Rivers and Harbors Act of 1899, in that the Highway Department constructed, owned, operated and maintained a hazard to navigation by allowing and utilizing the cable operated ferry to exist in a hazardous manner in navigable waters

(2) That the Highway Department violated the provisions of 14 U.S.C.A. §81, et seq., in that as the owner of the ferry they failed to comply with the provisions set forth in these statutes and failed to either properly mark or delineate the hazard that existed and failed to remove the same.

(3) That even if violations by the Highway Department of provisions set forth in 33 U.S.C.A. §401, et seq., and 14 U.S.C.A. §81, et seq., do not give rise to liability such liability exists under the general theory of maritime law regarding

wrongful death in that these statutes establish a standard of care to be adhered to by the Highway Department and by a violation of these standards they subject themselves to liability as expounded in Moragne v. United States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1969), and as a result are responsible for the damages sustained by the death of Faust and the injuries to Bennett and Muldrow.

(4) That pursuant to the "good Samaritan" theory of Indian Towing Co., Inc. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.48 (1955), the Highway Department is liable for the death of Faust and the injuries to Bennett and Muldrow.

(b) The preponderance of the evidence offered at the trial of these matters demonstrated that the injuries suffered by the plaintiffs were a direct and proximate result of the negligence and abuse of discretion of the Highway Department by

and through the acts and/or omissions of its agents, servants and/or its employees and, as a result, was actionable under one or more of the legal theories set forth by the plaintiff.

(18) The Highway Department by failing to remove the obstruction that it had constructed, owned and operated after it had full knowledge that it was a hazard and obstruction to navigation was a clear violation of the provisions embodied in 33 U.S.C.A. §401, et seq. In addition, the actions and inactions of the Highway Department were a clear breach and violation of the standard of care imposed upon it by virtue of the provisions contained in 33 U.S.C.A. §401, et seq.

(19) The failure of the Highway Department to adequately mark and sign the ferry, its approaches, and the guide cable violated the affirmative duty placed upon the state as owner of the ferry to adequately mark the hazard as it existed

or, in the alternative, to remove the hazard. The failure to accomplish either of these two matters was a violation of 14 U.S.C.A. §81, et seq., and the standard of care imposed thereby upon the Highway Department. This statute, among other requirements, provides the Coast Guard with the duty and responsibility of the marking of obstructions in the navigable waterways. The Coast Guard has in past cases been held liable for failing to mark and for improperly marking hazards, and it logically follows in this instance that the Highway Department as the creator of the hazard would also be liable pursuant to this statute and the applicable case law. Thomson v. United States, 266 F.2d 852 (4th Cir. 1959); Doyle v. United States, 441 F.Supp. 701 (D.S.C. 1977).

(20) The Highway Department's failure to properly warn boaters approaching the ferry with effective signs and other devices, in light of its knowledge about

the past accidents and the cable's propensity to cause such damage and injury, was a breach of the duty of care owed by the Highway Department to the boating public and under general maritime tort law, it is responsible for its conduct. Moragne v. United States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1969).

(21) The ineffective attempts by the Highway Department to place warning signs on the ferry and its approaches were all inadequate, and violated the duty of care imposed upon the Highway Department under the "good Samaritan" theory as outlined in Indian Towing Co., Inc. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.48 (1955). This theory as expounded in Indian Towing provides that once the Highway Department attempts to warn boaters of the hazard it is required to proceed in a manner so as to assure that the warning was properly made. This the Highway Department failed to do. See, Gaspar v. United

States, 460 F.Supp. 656 (D.C.Mass.1978);  
Chute v. United States, 449 F.Supp. 172  
(D.C.Mass.1978). Specifically, the state  
violated the "good Samaritan" principle in  
three (3) ways:

(1) The Highway Department's ineffective attempts to mark the hazard and their pseudo warning devices actually increased the risk caused by the cable ferry.

(2) The Highway Department was duty-bound to maintain the crossing in a safe, non-hazardous manner.

(3) The injuries suffered by the plaintiffs resulted from the plaintiffs' justifiable reliance on the presumption that the Highway Department would maintain all of its operations and those areas under its control in a safe, non-hazardous manner.

B. As to the United States of America

1. Jurisdiction and Sovereign  
Immunity of United States

(a) This court has jurisdiction of  
this action under 28 U.S.C.A. § 1333. The

actions instituted by the plaintiffs are appropriately brought under general maritime law. See, Moragne v. United States, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1969) and Sea Land Services v. Gaudet, 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1973).

The United States is a proper defendant by virtue of 46 U.S.C.A. §742, known as the Suits in Admiralty Act, whereby the United States may be sued in cases where, "if a private person were involved, a proceeding in admiralty could be maintained." Jones Towing, Inc. v. United States, 277 F.Supp. 839 (D.C.La.1967).

In addition, venue is properly laid according to 46 U.S.C.A. §742.

(22) (b) The Suits in Admiralty Act, 46 U.S.C.A. § 742, unlike the Federal Tort Claims Act, contains no discretionary function exception. Lane v. United States, 529 F.2d 1975 (4th Cir. 1975).

## 2. Liability of The Coast Guard

(23) (a) The Coast Guard, pursuant to 14 U.S.C.A. § 86, is charged with the duty and responsibility to mark "any sunken vessel or other obstruction existing on the navigable waters ... of the United States." This section, prior to being amended in 1965, made reference only to the marking of "any sunken vessel and other similar obstruction existing on any navigable waters." 14 U.S.C.A. § 86, as amended, 14 U.S.C.A. § 86 (Supp.1980). (Emphasis added). The legislative history pertaining to this amendment is found in Senate Report No. 688 and states, "This bill ... provides that the primary obligation for marking all obstructions to navigation rests with the Coast Guard." 1965 U.S.Code Cong. and Ad.News 3140 (Emphasis added) By way of this amendment, Congress broadened the application of 14 U.S.C.A. § 86 to include not only submerged obstructions, but surface obstructions as well.

(24) (b) The decision of Lane v. United States, 529 F.2d 175 (4th Cir. 1975) provides that the Coast Guard has some discretion in deciding whether or not to mark an obstruction and in this regard it must exercise its discretion responsibly. In the instant case, the Coast Guard failed to mark the cable, knowing full well that it constituted a serious danger and a real hazard to navigation. Thus, the failure of the Coast Guard to mark this cable was not a responsible exercise of their discretion, and their conduct was not reasonable under the existing circumstances.

(25) (c) In addition to, and outside of the obligation imposed by 14 U.S.C.A. § 86, the Coast Guard had an additional responsibility pursuant to 14 U.S.C.A. §81 which provides in part that "(1)n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels ..., the Coast Guard may establish, maintain and operate: (1) Aids to maritime navigation

required to serve the needs . . of the Commerce of the United States." Id. Along these same lines, the Coast Guard is charged under 33 C.F.R. § 66.01-1-10 (1976) with regulating private or state aids to navigation. Thus, it is the Coast Guard's duty to see that safe non-hazardous aids to navigation are correctly maintained by the states.

(26) Although the Coast Guard recognized their obligation as early as October 9, 1974, to require the Highway Department to adequately warn the boating public of the guide cable's danger, they failed to provide sufficient direction to the Highway Department concerning warnings to be placed on the cable itself. Pursuant to their authority under 14 U.S.C.A. §81, the Coast Guard directed the Highway Department to install signs at certain locations with certain specifications dealing with color, size, and lighting of the signs which would warn approaching

boaters of a "ferry crossing", but they made no effort to guard the public from the hazardous guide cable stretching across the waterway. In addition, the Coast Guard never followed through on its directives to determine if they had been completed and carried out by the Highway Department.

It has been held that if the United States is aware of a hidden danger and undertakes to mark it, it is subject to liability if the marking constitutes "a trap for the ignorant or unwary, rather than a warning of the danger." Somerset Seafood Co. v. United States, 193 F.2d 631, 635 (4th Cir. 1951). As provided in Indian Towing Company, Inc. v. United States, 350 U.S. 61, 76b S.Ct. 122, 100 L.Ed. 48 (1955), it is well recognized that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." Although Indian Towing involved a claim arising under the Federal Tort Claims Act,

this "good Samaritan" principle has been subsequently applied in admiralty cases. See, e.g., Frank v. United States, 250 F.2d 178 (3d Cir. 1961); United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960) Moreover, a 1960 amendment to the Suits in Admiralty Act would incorporate that concept since an Indian Towing type case would now be brought under 46 U.S.C.A. § 742 (commonly known as the Suits in Admiralty Act).

The Coast Guard in relation to its involvement with the South Island Ferry crossing completely ignored its duties and responsibilities embodied in 33 C.F.R. § 66.01-1, et seq. At no time did the Coast Guard require the Highway Department to comply with the applicable regulations regarding private aids to navigation, and it is liable for its conduct.

(d) Duty to Warn

(27) (1) The duty of the Coast Guard to warn mariners of hidden dangers to navi-

gation where the same are known to the Coast Guard is well established. Chapman v. United States, 541 F.2d 641 (7th Cir. 1976); Dye v. United States, 210 F.2d 123 (6th Cir. 1954); and Beeler v. United States, 256 F.Supp. 771 (D.C.Pa.1966).

This imposed duty arises from their knowledge of the hidden danger, their authority to implement correction, and their statutory responsibility to the public. This duty arises independently of the ownership, construction, maintenance, or operation of the dangerous obstruction. In the instant case, the Coast Guard knew of the dangers posed by the guide cable, yet it failed to provide or require adequate markings at the crossing.

### 3. Liability of the Corps of Engineers

(28) (a) Liability of the Corps rests in part under the language of 33 U.S.C.A. §401, et seq. (Rivers and Harbors Act of 1899). Although these sections do not

explicitly create a private enforcement mechanism, a private right of action can be implied on behalf of those injured by a violation of these sections. See Lauritzen v. Chesapeake Bay Bridge and Tunnel District, 404 F.2d 1001 (4th Cir. 1968). The long-established right of action to recover damages resulting from a violation of laws pertaining to obstruction of navigable waters has long been recognized by the Fourth Circuit. Id.

As early as 1927, the Supreme Court held a private person had the right to sue the United States for damages arising out of "failure to comply with its own navigation laws." Eastern Transp. Co. v. United States, 272 U.S. 675, 47 S.Ct. 289, 71 L.Ed.2d 472 (1927). This reasoning has been followed in a long line of cases. See, e.g., McCormick v. United States, 645 F.2d 299 (5th Cir. 1981); Lane v. United States, 529 F.2d 175 (4th Cir. 1975); Buffalo Bayou Transp. Co. v. United States, 375 F.2d 675

(5th Cir. 1967); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951); Doyle v. United States, 441 F.Supp. 701 (D.S.C.1977); Jones Towing Co. v. United States, 277 F.Supp. 839 (D.C.La.1967).

(29) (b) The Corps was negligent in failing to require the Highway Department to remove the cable which constituted a hazard and obstruction to navigation. The Corps had first hand knowledge of the ferry itself and the dangerous and hazardous condition that it caused to boaters using the waterway. This is evident by the fact that at least one previous suit had been filed against the Corps involving the South Island Ferry as well as the fact that there were numerous letters from the Corps addressing the problem caused by the ferry crossing. The Corps's failure to move against the State of South Carolina to require a closing of the ferry site until the cable could be removed, is evidence of

the Corps's lack of due care. To allow such an obstruction to continue as they did was negligence, and it was not a responsible exercise of their discretion.

(30) (c) Under the language of Moragne, the Corps is liable. That decision provided that "Where death is caused by a breach of duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislation direction to except a particular class of cases." The breach of duty by the Corps subjects them to general maritime law and liability under the provisions of Moragne.

(31) (d) The Corps as a result of its undertaking also falls under the language of Indian Towing Co., Inc. and subjects itself to the "good Samaritan" principle. It is evident that the undertaking in this instance by the Corps was not done in a careful and non-negligent manner.

C. Miscellaneous

(32) Under South Carolina law, S.C. Code Ann. §50-21-110(2) (1976), it is unlawful for a person who is under the influence of alcohol to use a motorboat, boat or vessel. This statute, unlike section 56-5-2950 of the 1976 Code of Laws of South Carolina (commonly referred to as the Implied Consent Law), applies only to boaters and sets forth no standards such as those found in the "Implied Consent Law" dealing with the operation of motor vehicles on the roads in the State of South Carolina. Accordingly, the presumptions found under the provisions of section 56-5-2950 would have no applicability to the matters pertaining to the operation of boats, motorboats or vessels in determining whether or not the operator was under the influence of alcohol. This being the case, the determination of intoxication must be based on testimony relating to a person's mannerisms and characteristics that would

lead one to conclude that he was under the influence of alcohol or it must be based on expert testimony relating to such matters.

The court has received and reviewed in this matter a report dealing with the blood alcohol content of the deceased but finds it inconsequential in this action inasmuch as the report standing alone without testimony either from lay persons as to matters that would lead one to believe that the deceased was under the influence or from an expert as to what might be expected of a person with a blood alcohol reading equivalent to that reflected on the report is of little value to the court.

(33) A number of questions arose during the trial of this case as to the admissibility of certain evidence and testimony as to matters occurring at the South Island site subsequent to December 11, 1977.

Timely objections were made by the attorneys representing the defendants as to the introduction of this evidence. After

reviewing the evidence, I find that the only evidence as to changes subsequent to December 11, 1977, that would be admissible in this matter would be those changes relating to the acquisition and installation of the self-propelled motorized ferry and the addition of the warning boats equipped with public address systems placed at the ferry site on December 12, 1977. Both of these matters are admissible under the provisions and scope of Rule 407 of the Federal Rules of Evidence.

D. Allocation of Damages

(34) As to the respective liability of the defendants, the rule in admiralty is, where more than one party is responsible for the accident, that the liability is to be allocated among the parties proportionate to the comparative degree of their fault. United States v. Reliable Transfer Co., 421 U.S. 397, 411 95 S.Ct. 1708, 1715, 44 L.Ed.2d 291 (1975). This

rule has also been followed in the decision of Miller Industries, Inc. v. Caterpillar Tractor Co., 473 F.Supp. 1147 (S.D.Ala.1979), where the court found that it may apportion the liability to the negligent defendants in accordance with their comparative degree of fault.

E. Damages

(35) An action lies under general maritime law for death caused by a violation or violations of maritime duties. The Moragne decision allows a widow to assert a claim for the wrongful death of her husband. In determining the elements of damage and the amount of damage, it is necessary for the court to follow the guidelines set forth in Gaudet.

(36) Under the language of Gaudet, it is recognized that there exists a right for the recovery of loss of support which includes all financial contributions the decedent would have made to his dependents had he lived. This includes monies that he

would earn from his livelihood as well as the monetary value of services that the decedent would have provided had he continued to live. These two elements include compensation both for net earnings and services provided prior to trial and for such services and monies that would have been provided during the work-life expectancy of the decedent.

In addition, Gaudet recognizes that services also include the nurture, training, education and guidance that a child would have received had his parent not been wrongfully killed. This is in addition to compensation for services that the decedent would have performed at home for his family and spouse.

Although Gaudet does not recognize mental anguish or grief, it establishes a clear right of the beneficiary to recover for a loss of "society." The term "society," in accordance with the language of Gaudet embraces a number of mutual

benefits that each family member would have received from the other's continued existence. These benefits include but are not limited to love, affection, care, attention, companionship, comfort and protection. It also includes loss of consortium as well as damages for funeral expenses that are incurred by the survivors.

Gaudet, although it set forth a number of guidelines to be used by the court, in no way limits the court's consideration of other elements outside of those set forth in Gaudet. Instead the decision recognized that in damages for tortuous injury, the court need not be insistent on mathematical precision and the language of Gaudet leaves to the judge or juror fair latitude to make reasonable approximations guided by judgment and practical experience.

(37) The elements of damage which can properly be considered in determining the amount of personal injury to a plaintiff

includes loss of earning power, pain and suffering, medical expenses and any future damage resulting from permanent injuries.

Watson v. Wilkinson Trucking Co., 244 S.C. 217, 136 S.E.2d 286, 291 (1964); Oliver v. Blakeney, 244 S.C. 565, 137 S.E.2d 772, 776 (1964).

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED, that judgment be entered in favor of the plaintiff, Alean Hester Faust, Administratrix of the Estate of Charles Lonnie Faust, deceased, against the defendants, South Carolina State Highway Department and the United States of American, jointly and severally, in the sum of Four Hundred Ninety-Nine Thousand Sixty-Nine and No/100 (\$499,069.00) Dollars. It is

ORDERED FURTHER, that judgment be entered in favor of the plaintiff, Curtis L. Muldrow, against the defendants, South Carolina State Highway Department and

United States of America, jointly and severally, in the sum of Eighteen Thousand and No/100 (\$18,000.00) Dollars. It is

ORDERED FURTHER, that judgment be entered in favor of the plaintiff, Tommy Bennett, against the defendants, South Carolina State Highway Department and United States of America, jointly and severally, in the sum of Five Hundred and No/100 (\$500.00) Dollars. It is

ORDERED FURTHER, that interest<sup>3</sup> on the above judgments as to the United States of America shall run at the rate of Four (4%) per cent per annum from the date of the filing of these lawsuits on May 15,

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<sup>3</sup> The allowance vel non of prejudgment interest in admiralty actions is a matter within the sound discretion of the trial court. Reiss Steamship Co. v. United States Steel Corp., 427 F.2d 1152, 1153 (6th Cir. 1970); Rosa v. Insurance Company of State of Pennsylvania, 421 F.2d 390, 393 (9th Cir. 1970); Circle Line Sightseeing Yachts v. Storbeck, 325 F.2d 338 (2d Cir. 1963); Gardner v. National Bulk Carriers, Inc., 221 F.Supp. 243, *aff'd*, 333 F.2d 676 (4th Cir. 1964).

1978; the interest on the above judgments as to the South Carolina State Highway Department shall run at the rate of Six (6%) per cent per annum from the date of the filing of these lawsuits on May 15, 1978, through July 4, 1979, and thereafter at the rate of Eight and Three-Fourths (8 3/4%) per cent per annum. It is

ORDERED FURTHER, that inasmuch as I have determined that the two defendants are equally liable and found the deceased not to have been contributorily negligent, that the crossclaims of the defendants against each other or contributions and their counterclaims against the estate of the owner and operator of the boat, Charles Lonnie Faust, be, and the same are hereby dismissed without prejudice.

AND IT IS SO ORDERED.

**APPENDIX D**

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 82-1288

Alean Hester Faust, Administratrix, of the  
Estate of Charles Lonnie Faust, deceased,  
Tommy Bennett, Curtis L. Muldrow,

Appellees,

v.

South Carolina State Highway Department,

Appellant,

and

United States of America,

Defendant.

Filed: November 1, 1983  
U.S. Court of Appeals,  
Fourth Circuit

Filed: December 23, 1983  
U.S. District Court

Appeal from the United States  
District Court for the District of South  
Carolina.

This cause came on to be heard on the  
record from the United States District  
Court for the District of South Carolina,  
and was argued by counsel.

On consideration whereof, It is now  
here ordered and adjudged by this Court  
that the judgment of the said District  
Court appealed from, in this cause, be, and  
the same is hereby, reversed.

s/William K. Slate  
Clerk

Petition For Rehearing:

Filed: November 14, 1983  
Denied: December 13, 1983